



Mashing Up Rawls: Semiotic Justice and Copyright Law

Citation

Jonathan Gingerich, Mashing Up Rawls: Semiotic Justice and Copyright Law (April 23, 2011).

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:4878918>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

MASHING UP RAWLS: SEMIOTIC JUSTICE AND COPYRIGHT LAW

JONATHAN GINGERICH^{*}

jgingerich@jd10.law.harvard.edu

Draft of April 23, 2011

INTRODUCTION	1
I. JUSTICE AS FAIRNESS AND SEMIOTIC JUSTICE: THE FAIR VALUE OF CULTURAL LIBERTIES	3
<i>A. Rawls's Account of Justice as Fairness and the Equal Value of the Political Liberties...</i>	4
<i>B. Semiotic Justice: The Fair Value of the Cultural Liberties.....</i>	13
<i>C. Rawlsian Objections.....</i>	23
<i>D. Implications for Rawls's Political Conception of the Person.....</i>	37
II. SEMIOTIC JUSTICE OUTSIDE THE ORIGINAL POSITION: A BENCHMARK FOR LAW	38
III. SEMIOTIC JUSTICE IN AMERICAN COPYRIGHT LAW	40
<i>A. Elements of Copyrightable Subject Matter.....</i>	43
<i>B. Joint Authorship</i>	50
<i>C. Copyright Duration</i>	51
<i>D. Fair Use</i>	52
IV. FOUR CONTRASTS	55
<i>A. The Welfare Argument for Copyright.....</i>	57
<i>B. The Fairness Argument for Copyright</i>	65
<i>C. Personhood Theories of Property</i>	70
<i>D. The Culture Argument for Copyright.....</i>	74

INTRODUCTION

This article is about justice and culture and what they mean for each other. It's about creativity and play and writing novels and remixing songs. Particularly, it is about people doing all of these things with one another. To explore these topics, this article investigates what John Rawls's political theory of justice, "justice as fairness," means for laws that regulate cultural production, particularly copyright law, and what such laws mean for justice as fairness.

^{*} Ph.D. Student, UCLA Department of Philosophy. J.D., Harvard Law School, 2010. I would like to thank Marlon Arias, Yochai Benkler, Julie Cohen, Norman Daniels, Caroline DeCell, Clark Donley, William Fisher, Ashley Gorski, Sabrina Karim, Roy Kreitner, Frank Michelman, and Henry Richardson for their many insightful comments and their support. I would also like to thank Harvard Law School for supporting my research with a Summer Academic Fellowship.

I begin in Part I by describing Rawls's account of justice as fairness with particular attention to his proviso guaranteeing the fair value of the equal political liberties. I argue that the reasons that Rawls gives for the proviso apply just as much to many of the basic liberties connected to cultural freedom as to the equal political liberties. I argue that the best solution to this problem, within the limited world of Rawlsian political theory, is to adopt a similar proviso for the cultural liberties. Like the equal political liberties, these liberties should be considered constitutional essentials. I call the theory of this proviso "semiotic justice," and I argue that semiotic justice adequately addresses the shortcomings that justice as fairness has with respect to cultural liberties.¹ I then argue that "semiotic justice" requires some modifications to Rawls's political conception of the person. In Part II, I explain how semiotic justice can be applied to American copyright law. Semiotic justice does not provide an overarching doctrinal theory of copyright that judges can simply apply to decide cases, but it does provide a benchmark against which we can evaluate how well the American copyright system is doing. In Part III, I flesh out the specifics of what semiotic justice means for copyright law by exploring what it has to say about copyright protection for useful articles, joint authorship, copyright duration, the scope of copyright protection, and the fair use doctrine. In Part IV, I contrast semiotic justice with four other strands of copyright theory, including welfare based theories, fairness theories, personhood theories, and Aristotelian theories, and I argue that semiotic justice offers, at least in some instances, an improvement to these theories that better achieves the liberal goal of neutrality of aim among different conceptions of the good.

¹ "Semiotic justice" is a modification of John Fiske's phrase, "semiotic democracy." JOHN FISKE, *TELEVISION CULTURE* 236-39 (1987) (arguing that television fosters a "semiotic democracy" through its playfulness); *see* WILLIAM W. FISHER III, *PROMISES TO KEEP* 28-31 (2004) (deploying the phrase "semiotic democracy" in a theory of intellectual property).

The theory that I develop in this paper is a political theory, and it speaks from the perspective of citizens doing political philosophy. But it also attempts to develop an understanding of how political philosophy can speak effectively about culture, understanding that there is a give and take between politics and culture, that neither is antecedent to the other, and that it would be possible to develop a cultural theory of politics that is just as accurate as my political theory of culture.² My theory operates within the big tent of liberalism, situating itself in relation to Rawls in Part I and to several other liberal theories in Part IV. If semiotic justice succeeds as a theory, it will suggest some possible resolutions to conflicts that are embedded in liberal society. Furthermore, as a Rawlsian theory, I hope that semiotic justice can attract an “overlapping consensus” of liberal theories of copyright that will endorse its precepts which are, I will argue in Part IV, “thinner” than those of the other theories of copyright. However, by exploring the connection between culture and political justice, my theory might at least explain how cultural conditions can contribute to such a visceral commitment to liberalism.

I. JUSTICE AS FAIRNESS AND SEMIOTIC JUSTICE: THE FAIR VALUE OF CULTURAL LIBERTIES

In this section, operating at the level of ideal political theory, I draw on Rawls’s account of justice as fairness and explore why Rawls incorporates a proviso into his theory of justice that guarantees the fair value of the equal political liberties.³ I argue that just as this guarantee of the fair value of political liberties is necessary for the development and exercise of what Rawls identifies as the first moral power (the capacity for a sense of justice), it is necessary to guarantee the fair value of cultural liberties in order to ensure that people can develop and exercise the second moral power (the capacity for a conception of the good). I designate my theory of the

² See, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007) (articulating a theory of creativity largely from the standpoint of culture).

³ See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 48 (Erin Kelly ed., 2001).

fair value of the cultural liberties “semiotic justice.” Relying on arguments drawn from literary and cultural theory, I argue that the ability to participate in shaping what a culture looks like is a necessary element of expressing and developing one’s own conception of the good, and I argue that many of the reasons that it is important to guarantee the fair value of the political liberties apply to cultural liberties as well. Ultimately, I argue, the urgency of cultural liberties is so great that their fair value is a constitutional essential: a legitimation worthy constitution is one that guarantees the fair value of the cultural liberties (as well as of the equal political liberties).

A central and deeply attractive feature of John Rawls’s theory of justice as fairness is its commitment to ensuring that individuals are able to choose for themselves what matters most about their lives and providing as many people as possible the resources to pursue the meaning that is important to them, without requiring society to pass judgment on what forms of life are and are not worth pursuing, or deciding for individuals what they should care about. However, while Rawls premises his account of justice as fairness on an intuitively attractive political conception of the person, his theory ultimately runs into a problem by failing to recognize the extent to which individuals’ capacities to form and pursue conceptions of the good are shaped by the culture, and not just the political system, that they inhabit.

A. Rawls’s Account of Justice as Fairness and the Equal Value of the Political Liberties

In *Justice as Fairness: A Restatement*, Rawls begins his statement of his theory by outlining a number of “fundamental ideas,” including the roles of political philosophy,⁴ the idea of society as a fair system of cooperation,⁵ the idea of a well-ordered society,⁶ the idea of the basic structure,⁷ the idea of the original position,⁸ the idea of free and equal persons,⁹ the idea of

⁴ RAWLS, *supra* note 3, at 1-5.

⁵ RAWLS, *supra* note 3, at 5-8.

⁶ RAWLS, *supra* note 3, at 8-10.

⁷ RAWLS, *supra* note 3, at 10-12.

public justification,¹⁰ the idea of reflective equilibrium,¹¹ and the idea of an overlapping consensus.¹² For the moment, I will focus in on the idea of society as a fair system of cooperation and the idea of free and equal persons. The idea of society as a fair system of cooperation is “the most fundamental idea in [the] conception of justice” as fairness.¹³ This idea has, for Rawls, three essential features. First, social cooperation is more than mere socially coordinated activity. It is not simply “activity coordinated by orders issued by an absolute central authority” but is “guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct.”¹⁴ Second, it is marked by a commitment to reciprocity, including “the idea of fair terms of cooperation” that “each participant may reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them.”¹⁵ Third, it includes the idea that participants in social cooperation pursue their “rational advantage,” which “specifies what it is that those engaged in cooperation are seeking to advance from the standpoint of the good.”¹⁶

A second fundamental idea that Rawls relies on is the idea of free and equal persons. This idea of persons is a political conception, meaning that it “is not taken from metaphysics or the philosophy of mind or from psychology,” although it must be compatible with some set of possible philosophical and psychological conceptions of the person.¹⁷ Instead, it is “worked up from the way citizens are regarded in the public political culture of a democratic society, in its

⁸ RAWLS, *supra* note 3, at 14-18.

⁹ RAWLS, *supra* note 3, at 18-24.

¹⁰ RAWLS, *supra* note 3, at 26-29.

¹¹ RAWLS, *supra* note 3, at 29-32.

¹² RAWLS, *supra* note 3, at 32-38.

¹³ RAWLS, *supra* note 3, at 5.

¹⁴ RAWLS, *supra* note 3, at 6.

¹⁵ RAWLS, *supra* note 3, at 6.

¹⁶ RAWLS, *supra* note 3, at 6.

¹⁷ RAWLS, *supra* note 3, at 19.

basic political texts (constitutions and declarations of human rights), and in the historical tradition of the interpretation of those texts.”¹⁸ The idea of the person that Rawls comes up with on the basis of examining the “enduring writings that bear on . . . [the] political philosophy” of a democratic society is that persons have “the two moral powers”¹⁹:

(i) One such power is the capacity for a sense of justice: it is the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.

(ii) The other moral power is a capacity for a conception of the good: it is the capacity to have, to revise, and rationally to pursue a conception of the good.

Such a conception is an ordered family of final ends and aims which specifies a person’s conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life. The elements of such a conception are normally set within, and interpreted by, certain comprehensive religious, philosophical, or moral doctrines in light of which the various ends and aims are ordered and understood.²⁰

These powers are not momentary but instead realized over the course of a full life.²¹ Further, citizens are regarded as equal persons in that “they are all regarded as having to the essential minimum degree the moral powers necessary to engage in social cooperation over a complete life and to take part in society as equal citizens.”²²

¹⁸ RAWLS, *supra* note 3, at 19.

¹⁹ RAWLS, *supra* note 3, at 20.

²⁰ RAWLS, *supra* note 3, at 18-19.

²¹ RAWLS, *supra* note 3, at 19.

²² RAWLS, *supra* note 3, at 19.

To illustrate several fundamental ideas, including the conception of persons as having the two moral powers, Rawls constructs a hypothetical initial choice situation, which he calls the original position, where representatives of the parties to social cooperation try to agree on a conception of justice that all of the parties can share. In the original position the representatives, situated behind a “veil of ignorance,” “are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent,” nor do they know the “race and ethnic group, sex, or various native endowments such as strength and intelligence” of the people they represent.²³ The parties do know “the general commonsense facts of human psychology and political sociology.”²⁴ This initial choice situation represents the first of four stages of social cooperative decision-making, where more information about the parties is revealed in each subsequent stage. After the first stage of identifying principles of political justice comes the second stage of constitution making, followed by legislation, and then by adjudication. The later stages give life to the principles of justice selected in the first stage, and the veil of ignorance is lifted a bit further in each stage subsequent to the first.

Within this original position, and given the conception of persons as having the two moral powers, Rawls argues that the parties to social cooperation will select two principles of justice, which are:

- (a) Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

²³ RAWLS, *supra* note 3, at 15. The representatives do know, however, that the people they represent have certain minimum moral, intellectual, and physical capacities. See JOHN RAWLS, POLITICAL LIBERALISM 184 (expanded ed. 2005) [hereinafter RAWLS, POLITICAL LIBERALISM].

²⁴ RAWLS, *supra* note 3, at 101.

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).²⁵

These principles are lexically ordered, with “the first principle . . . prior to the second” and, within the second principle, “fair equality of opportunity is prior to the difference principle.”²⁶ For the moment, I will not explore all of the mechanics behind the adoption of these principles, except to note that the basic liberties referenced in the first principle are specified by list, and include “freedom of thought and liberty of conscience; political liberties (for example, the right to vote and participate in politics) and freedom of association, as well as rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law.”²⁷ This list of basic liberties is arrived at by considering “what liberties provide the political and social conditions essential for the adequate development and full exercise of the two moral powers of free and equal persons.”²⁸ Rawls divides up the basic liberties into those that “enable citizens to develop and exercise [the moral] powers in judging the justice of the basic structure of society and its social policies,” which are “the equal political liberties and freedom of thought,” and those liberties that “enable citizens to

²⁵ RAWLS, *supra* note 3, at 42-43. The difference principle means that, “unless there is a distribution that makes both persons better off (limiting ourselves to the two-person case for simplicity), an equal distribution is to be preferred.” JOHN RAWLS, A THEORY OF JUSTICE 76 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE]. Thus, if two parties were choosing in the legislative stage between three economic systems (each of which satisfied the first principle and the principle of fair equality of opportunity) where system A would yield a distribution to two parties of (9, 9) (in units of primary goods), system B a distribution of (10, 13), and system C (8, 16), parties following the difference principle would prefer B over either A or C and A over C.

²⁶ RAWLS, *supra* note 3, at 43.

²⁷ RAWLS, *supra* note 3, at 44.

²⁸ RAWLS, *supra* note 3, at 45.

develop and exercise their moral powers in forming and revising, and in rationally pursuing (individually or, more often, in association with others) their conception of the good.”²⁹ Thus, the basic liberties are supposed to ensure that people who are participating in a project of social cooperation are able to realize both moral powers, and cooperators would not give up these basic liberties, or even risk doing so, because surrendering these liberties would mean giving up on the centrality of the moral powers to the conception of the person that Rawls presupposes.

Norman Daniels objected to the mechanics of the first principle shortly after the publication of *A Theory of Justice* in an essay titled “Equal Liberty and Unequal Worth of Liberty.”³⁰ Daniels objection to Rawls takes the following form: Rawls assumes that political equality is compatible with significant social and economic inequality (because the difference principle will always permit such inequalities, provided that they are to the advantage of the least well off).³¹ Furthermore, the views of the best off classes are most likely to be advanced in the media,³² and the unequal value of liberty flows from (usually) legal exercise of the abilities, authority, and power that accompany wealth.³³ Thus, the unequal value of the basic liberties can result in a cascading effect of entrenched advantage and disadvantage, as the already well off gain control of the media and thereby of the political process. Daniels argues that parties in the original position, knowing that it may not be possible to develop adequate constitutional safeguards to prevent inequalities in wealth from producing inequalities in liberty, “might not be

²⁹ RAWLS, *supra* note 3, at 45.

³⁰ Norman Daniels, *Equal Liberty and the Unequal Worth of Liberties*, READING RAWLS 253 (Norman Daniels ed., 1975).

³¹ Daniels, *supra* note 30, at 254.

³² Daniels, *supra* note 30, at 256. For example, wealthy individuals may be able to purchase campaign advertisements advancing their views in political campaigns, leading in turn to increased political influence.

³³ Daniels, *supra* note 30, at 257.

able to accept the conjunction of the First and Second Principles.”³⁴ Rawls attempts to solve this problem by distinguishing between liberty and the “worth of liberty,” writing that:

The inability to take advantage of one’s rights and opportunities as a result of poverty and ignorance, and a lack of means generally is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty, the value to individuals of the rights that the First Principle defines.³⁵

Daniels responds to this distinction by arguing that on the basis of Rawls’s own theory, this distinction is arbitrary.³⁶ Specifically, Daniels argues, public knowledge of the worth of citizenship liberties³⁷ can serve as a basis for self-respect, and “it is hard to see how the well-ordered society could succeed in guaranteeing that the affirmation of equal liberties would successfully serve as the basis of self-respect but prevent knowledge of unequal worth of liberty from playing any role.”³⁸ The parties in the original position, who would want “to avoid at almost any cost the social conditions that undermine self-respect,”³⁹ would be rational in insisting on a guarantee not just of equal citizenship liberties, but on their equal worth.⁴⁰

This critique prompted Rawls to respond by clarifying that a proviso to the first principle requires that the equal political liberties (and *only* these liberties) be guaranteed their fair value to all persons.⁴¹ This proviso, Rawls says, responds to the objection that the equal liberties in a

³⁴ Daniels, *supra* note 30, at 258.

³⁵ RAWLS, A THEORY OF JUSTICE, *supra* note 25, at 204.

³⁶ Daniels, *supra* note 30, at 263.

³⁷ “Citizenship liberties” is Daniels’s term for the liberties related to the parties’ ability to “influence and participate in the political process.” Daniels, *supra* note 30, at 275.

³⁸ Daniels, *supra* note 30, at 276.

³⁹ RAWLS, A THEORY OF JUSTICE, *supra* note 25, at 440, *quoted in* Daniels, *supra* note 30, at 273.

⁴⁰ Daniels, *supra* note 30, at 277.

⁴¹ RAWLS, *supra* note 3, at 148 n.20.

modern state are merely formal.⁴² Rawls specifies that this proviso “means that the worth of the political liberties to all citizens, whatever their economic or social position, must be sufficiently equal in the sense that all have a fair opportunity to hold public office and affect the outcome of elections and the like” and that “[t]he requirement of the fair value of the political liberties, as well as the use of primary goods, is part of the meaning of the two principles of justice.”⁴³

Rawls’s reasoning for the proviso parallels Daniels’s argument about the importance of ensuring that all citizens have a roughly equal chance of making their voices heard in the political arena: the proviso “secures for each citizen a fair and roughly equal access to the use of a public facility designed to serve a definite political purpose, namely the public facility specified by the constitutional rules and procedures which govern the political process and control the entry into positions of political authority.”⁴⁴ Additionally, Rawls concedes that the difference principle is, by itself, insufficient to prevent the distortion of the value of the equal political liberties. The “public facility” of political institutions “has limited space as it were. Without a guarantee of the fair value of the political liberties, those with greater means can combine together and exclude those who have less. . . . The limited space of the public political form, so to speak, allows the usefulness of the political liberties to be far more subject to citizens social position and economic means than the usefulness of other basic liberties.”⁴⁵ Concretely, one implication of this guarantee of the fair value of political liberties is that the decision of the United States Supreme Court in *Buckley v. Valeo*⁴⁶ is inconsistent with the requirements of justice as fairness because it

⁴² RAWLS, *supra* note 3, at 148-49.

⁴³ RAWLS, *supra* note 3, at 149.

⁴⁴ RAWLS, *supra* note 3, at 150.

⁴⁵ RAWLS, *supra* note 3, at 150.

⁴⁶ *Buckley v. Valeo*, 424 U.S. 1 (1976) (striking down limits on expenditures in favor of individual candidates for office imposed by the Election Act Amendment of 1974 because such limits are direct and substantial limitation on political speech).

“seems to reject altogether the idea that Congress may try to establish the fair value of the political liberties.”⁴⁷

Rawls makes abundantly clear that this proviso of the fair value of the equal political liberties extends *only* to these liberties and no further. Rawls reasons that “the fair value for all the basic liberties” need not be secured.⁴⁸ Doing so would be “either irrational, or superfluous, or socially divisive.”⁴⁹ Supposing that such a requirement would “mean[] that income and wealth are to be distributed equally,” the requirement would be irrational because it would “not allow society to meet the requirements of social organization and efficiency.”⁵⁰ If such a condition requires that “a certain level of income and wealth is to be assured to everyone in order to express their ideal of the equal worth of the basic liberties” then it would be superfluous, as the difference principle already has the effect of requiring this, since the difference principle requires the basic structure to be arranged in a way that will guarantee that every individual has the greatest level of income and wealth possible, consistent with the first principle of justice and the fair equality of opportunity.⁵¹ But if guaranteeing the fair value of the basic liberties “means that income and wealth are to be distributed according to the content of certain interests regarded as central to citizens’ plans of life, for example religious interests, then it is socially divisive.”⁵² Rawls’s conception of justice as fairness “rules out claims based on various wants and aims arising from people’s different and incommensurable conceptions of the good.”⁵³ For example, requiring that more resources be allocated to members of society who claim religious needs to

⁴⁷ RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 360.

⁴⁸ RAWLS, *supra* note 3, at 150.

⁴⁹ RAWLS, *supra* note 3, at 151.

⁵⁰ RAWLS, *supra* note 3, at 151.

⁵¹ RAWLS, *supra* note 3, at 151.

⁵² RAWLS, *supra* note 3, at 151.

⁵³ RAWLS, *supra* note 3, at 151.

erect magnificent temples than to those citizens who do not claim such religious needs would violate justice as fairness.⁵⁴ Thus, Rawls argues, while the equal political liberties must be of roughly equal usefulness for all citizens, such a requirement cannot be extended to the other basic liberties.

B. Semiotic Justice: The Fair Value of the Cultural Liberties

For Rawls the equal political liberties appear on the list of the basic liberties because these liberties along with freedom of thought allow citizens to develop their first moral power, “judging the justice of the basic structure of society and its social policies.”⁵⁵ In the initial choice situation of the original position, citizens’ representatives would insist on guaranteeing the fair value of the equal political liberties because, given the possibility for structural distortions of the worth of political power, endorsing the principles of justice without such a proviso would risk parties losing their ability to lead lives in which they could realize and develop the first moral power. Because the moral powers are so fundamental to personhood, the representatives would be unwilling to even risk damaging the first moral power, argues Rawls.⁵⁶ Of course, the parties would be equally unwilling to gamble with the second moral power. The basic liberties of liberty of conscience and freedom of association are, Rawls says, connected with “the capacity for a (complete) conception of the good.”⁵⁷ I argue that to the extent that these liberties are cultural liberties, their fair value must be guaranteed in order to ensure that citizens are able to develop the second moral power.⁵⁸ Citizens’ representatives in the original position would be unwilling to risk losing this capability and would, therefore, insist on a proviso

⁵⁴ RAWLS, *supra* note 3, at 151.

⁵⁵ RAWLS, *supra* note 3, at 45.

⁵⁶ RAWLS, *supra* note 3, at 106-10.

⁵⁷ RAWLS, *supra* note 3, at 113.

⁵⁸ Cf. William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 876-78 (1999) (describing “expressive liberty”).

of what I call “semiotic justice” parallel to the proviso of the fair value of the equal political liberties when they form and agree upon their political conception of justice, particularly justice as fairness.

The first step of my argument is to argue that trustees in the original position know certain “general commonsense facts” about culture, including the following.

“Culture” is a space where members of a society articulate and develop their conceptions of the good. When I talk about “culture” without any definite or indefinite article, I am speaking of this space rather than of any particular set of conceptions deployed within it. What constitutes “culture,” like the basic liberties, is given by a list. Roughly speaking, culture is “all those practices, like the arts of description, communication, and representation, that have relative autonomy from the economic, social, and political realms and that often exist in aesthetic forms, one of whose principle aims is pleasure.”⁵⁹ These are mechanisms that people use to share and

⁵⁹ EDWARD SAID, *CULTURE AND IMPERIALISM*, at xii (1993). For Said, culture is also “a concept that includes a refining and elevating element, each society’s reservoir of the best that has been known and thought, as Matthew Arnold put it in the 1860s.” *Id.* at xiii. The practices that constitute culture have only *relative* autonomy from politics. In many ways, of course, culture is intensely political. *See, e.g.*, EDWARD SAID, *HUMANISM AND DEMOCRATIC CRITICISM* 128-29 (2001) (criticizing Pascal Casanova for suggesting that “literature as globalized system has a kind of integral autonomy to it that places it in large measure just beyond the gross realities of political institutions and discourse”); *see also, e.g.*, TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 21 (2d ed. 1996) (“If the masses are not thrown a few novels, they may react by throwing up a few barricades.”). Indeed, cultural practices are often intimately connected with politics. Thus, some space for culture is certain to be guaranteed by the proviso of the fair value of the equal political liberties. However, culture is about many other things, too, centrally connected to many individuals’ conceptions of the good. The partial autonomy of culture might also be understood as an analogous to Duncan Kennedy’s description of the relationship between law and politics:

Even in Clausewitz’s famous formulation, war is politics by other means, not “just” politics. In Carl Schmitt’s flip of Clausewitz, politics is war by other means, but not reducible to war. War as “means” can be an end, or a means to other ends than politics. If law is politics, it is so, again, by other means, and there is much to be said, nonreductively, about those means.

learn about their own and other conceptions of value, meaning, or the good. This list is vague, because the precise contours of “culture” shift over time and from place to place.⁶⁰ Furthermore, culture is a public facility, particularly one that allows for the exercise of the second moral power. Culture as a public facility is not any one conception of culture, but rather the space in which conceptions of culture play out. The space is not given wholly by the political practices of the state, making it somewhat more attenuated from the principles of political justice than the facility of political space, but it is defined in important ways by the rules that are provided for its regulation by the state and it is, in this way, part of the basic structure of society.⁶¹ The expressions of conceptions of the good that occupy the space of culture powerfully shape the

Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David Trubek & Alvaro Santos eds., 2006). Similarly, culture is politics by other means and, although it may always be possible to draw lines from politics to culture and back, culture has a domain that is at least partially its own and that is, in some meaningful ways different from the domain of politics. See PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* 37-38 (Randal Johnson trans., 1993) (“[T]he literary and artistic field . . . is contained within the field of power . . . while possessing a relative autonomy with respect to it, especially as regards its economic and political principles of hierarchization.”).

⁶⁰ Selma James provides an exemplary filling-out of the many things that go into culture in a particular situation:

The life-style unique to themselves which a people develop once they are enmeshed by capitalism, in response to and in rebellion against it, cannot be understood at all except as the totality of their capitalist lives. To delimit culture is to reduce it to a decoration of daily life. Culture is plays and poetry about the exploited; ceasing to wear mini-skirts and taking to trousers instead; the clash between the soul of Black Baptism and the guilt and sin of white Protestantism. Culture is also the shrill of the alarm clock that rings at 6 a.m. when a Black woman in London wakes her children to get them ready for the baby minder. Culture is how cold she feels at the bus stop and then how hot in the crowded bus. Culture is how you feel on Monday morning at eight when you clock in, wishing it was Friday, wishing your life away. Culture is the speed of the line or the weight and smell of dirty hospital sheets, and you meanwhile thinking what to make for tea that night. Culture is making the tea while your man watches the news on the telly.

SELMA JAMES, *SEX, RACE, AND CLASS* 13 (1975).

⁶¹ See RAWLS, *supra* note 3, at 10.

resources that citizens who partake of the culture have available to them when forming, revising, and pursuing their own conceptions of the good.⁶²

Additionally, the public facility of culture has limited space. As in politics, “[n]ot everyone can speak at once, or use the same public facility at the same time for different purposes.”⁶³ The limited nature of this space combined with its semi-autonomous nature makes it likely that, as in the realm of the political liberties, differences of wealth and status that are permissible under the difference principle will be amplified in this space, allowing those with more power in the space of culture to shape the conceptions of good that are available in the cultural space.⁶⁴ For instance, in the domain of literature, which is a sub-domain of culture, there is “a paradoxical sort of marketplace, constituted around a non-economic economy, and functioning according to its own set of values: for production and reproduction here are based on a belief in the ‘objective’ value of literary creations—works denominated as ‘priceless.’”⁶⁵

⁶² On the power of cultural resources to form and shape the ability of participants in that culture to develop and pursue their own conceptions of the good, see *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.); *Mozert v. Hawkins*, 765 F.2d 75 (6th Cir. 1985); LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127 (Ben Brewster trans., 1971); ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Quintin Hoare trans., 1971); JEAN BAUDRILLARD, *JEAN BAUDRILLARD: SELECTED WRITINGS* (Mark Poster ed., 2001); FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991); JOHN FISKE, *TELEVISION CULTURE* 55-66 (1987); EDWARD SAID, *CULTURE AND IMPERIALISM* (1993); see also ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (new ed. 2001); ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* (1984).

⁶³ RAWLS, *supra* note 3, at 110.

⁶⁴ See PIERRE BOURDIEU, *THE SOCIAL STRUCTURES OF THE ECONOMY* (Chris Turner trans., 2005); BOURDIEU, *supra* note 59; PIERRE BOURDIEU, *THE RULES OF ART* (Susan Emanuel trans., 1996); PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice trans., 1984); PASCALE CASSANOVA, *THE WORLD REPUBLIC OF LETTERS* (M.B. Depevoise trans., 2004). I do not mean to suggest that culture is shaped only by politics and law; there may be sources of culture that arise independently from politics. See generally, e.g., SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (James Strachey trans., 1961) (1930) (describing culture as arising from the psychological structure of human beings).

⁶⁵ Pascale Cassanova, *Literature as a World*, 31 NEW LEFT REV. 71, 83 (2005).

Furthermore, in this “world literary space,” “prestige is the quintessential form [that] power takes . . . the intangible authority unquestioningly accorded to the oldest, noblest, most legitimate (the terms being almost synonymous) literatures”⁶⁶ And domination in this world literary space exists in a variety of forms, “linguistic, literary and political domination—this last increasingly taking on an economic cast.”⁶⁷ These three forms of domination “overlap, interpenetrate and obscure one another to such an extent that often only the most obvious form—political-economic domination—can be seen,”⁶⁸ but because literature exists as a semi-autonomous domain with its own non-economic measures of worth, literary domination is non-identical with political domination, and particularly with economic domination. Winning Nobel Prizes in literature, for instance, is not clearly correlated with the GDP of an author’s country, but winning this prize is correlated with writing in a way that engages in a particular way with a chain of literature going back to writings produced several hundred years ago in the vicinity of the river Rhine.⁶⁹ Because literary power can be accumulated outside of economic and political power, it is possible from a Rawlsian perspective for inequalities that are permitted by the difference principal to grow into intractable domination in literary space, allowing those individuals (like authors and editors) and entities (like the Swedish Academy, which grants the Nobel Prize in Literature) who control access to prestige to act as gatekeepers, determining who can and cannot contribute their expression to world literary space.⁷⁰

⁶⁶ Cassanova, *supra* note 65, at 83.

⁶⁷ Cassanova, *supra* note 65, at 87.

⁶⁸ Cassanova, *supra* note 65, at 87.

⁶⁹ See Cassanova, *supra* note 65, at 74; see also Franco Moretti, *Conjectures on World Literature*, 1 NEW LEFT REV. 54, 54 (2000).

⁷⁰ Of course, this is not just arbitrary control; power can be accumulated in world literary space over time precisely because access to the literary center is determined by how literary texts relate to the existing world literary canon; if an author writes a novel that engages in the right way with

I take the foregoing description of the economics of literary production (or, in any case, some description similar enough to it to demonstrate that power can be accumulated in the domain of literature independently of economic and political power and that this accumulation of power can lead to the accentuation of economic and political inequalities in the cultural realm) to be sufficiently apparent to be counted as general knowledge about political sociology available to the parties in the original position. Likewise, it seems apparent that something like this account can be extended to visual art as well.⁷¹

The extension of this story beyond bourgeois “high” art and literature to cultural production is somewhat trickier. Is the production of, say, television programming structured in a way that allows individuals and institutions to accumulate power over time, gradually leading to the accentuation and exaggeration of otherwise permissible inequalities? An optimistic view is taken by John Fiske, who argues that television is “a text of contestation which contains forces of closure and of openness and . . . allows viewers to make meanings that are subculturally pertinent to them, but which are made in resistance to the forces of closure in the text”⁷² Thus, “[t]elevision is a ‘producerly’ medium,” where “the work of the institutional producers of its programs requires the producerly work of the viewers and has only limited control over that work.”⁷³ This is what Fiske calls television’s “semiotic democracy.”⁷⁴ Other cultural theorists, however, are not as sanguine about the “openness” of late capitalist cultural production. Max Horkheimer and Theodor Adorno, for instance, argue that a “culture industry” dominates the field of popular production and that accumulations of capital are necessary for individuals or

the tradition of literature that makes up the global literary center, the gatekeepers are supposed to grant the novelist admission (and the gatekeepers often actually do so).

⁷¹ See BOURDIEU, *supra* note 59, at 40.

⁷² FISKE, *supra* note 1, at 239.

⁷³ FISKE, *supra* note 1, at 239.

⁷⁴ FISKE, *supra* note 1, at 239.

entities to participate in the development of mass culture. “Only those who can keep paying the exorbitant fees charged by the advertising agencies . . . those who are already part of the system or are co-opted into it by the decisions of banks and industrial capital, can enter the pseudomarket [of culture] as sellers.”⁷⁵ Liberties to write, to make music, or to mash up videos are not worth the same amount to everyone; some people in a political society are far better positioned to make use of these liberties than others. Horkheimer and Adorno’s analysis may seem dated. Particularly, one may wonder whether technological developments subsequent to their writing, and especially the Internet, have fragmented “the culture industry.” But more contemporary cultural theorists suggest that, in spite of technological changes in cultural production in the past-half century, much cultural production is still performed by heavily capitalized institutional actors.⁷⁶

Before proceeding to the next step of my argument, I note that this picture of literature and, by extension, of culture (or a picture similar to it) is crucial for my account of semiotic justice. If you do not think it plausible that literary power is at all distinct from underlying economic and political power, that literature is just superstructure, you are likely to think that any principle of political justice focused specifically on cultural liberties is superfluous, given the requirements of a fully adequate scheme of equal basic liberties and the difference principle.⁷⁷ If

⁷⁵ MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS* 131 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002).

⁷⁶ See, e.g., LAWRENCE LESSIG, *REMIX* 106 (2008) (arguing that “read only” culture “will [continue to] flourish in the digital age.”); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 63 (1990) (“Whatever we do with the concept, we should not read postmodernism as some autonomous artistic current. Its rootedness in daily life is one of its most patently transparent features.”).

⁷⁷ I say “plausible” because, if you think that this is a plausible description of how cultural production works, and you are a risk averse party in the original position, and you think that, absent safeguards, the structure of cultural production *might* prevent some people from realizing the second moral power, you might insist on building safeguards into the principles of justice to

cultural space does not have the tendency to allow a small number of people to accumulate cultural power, then following the first and second principles may produce the best outcomes for cultural liberties that can be achieved. You might still find that when it comes to providing guidance for legislatures or courts it is helpful to remind them of the importance of cultural freedoms, but think that doing so is a matter of practical politics, not of political justice. Or if you are a value pluralist, with a loosely articulated doctrine of political and non-political values who cares about rights of cultural expression, and you reject my picture of the economics of culture, then you might take my argument as a reason to join a Rawlsian overlapping consensus, but you will not see the semiotic justice proposal as a requirement of justice.

I now move to the second step in my argument. The shape of culture is tightly connected to the ability of participants in that culture to form, revise, and pursue their own conceptions of the good. While the range of possible conceptions of the good is not strictly limited to the exact set of such conceptions in a culture in which one is born, the vast majority of conceptions of the good that persons exercising the second moral power will form over the course of a complete life will fall more or less in the range of conceptions of the good in the society or societies in which they live most of their lives. Cognitive psychologists might describe this as the result of an availability heuristic.⁷⁸ This availability may also harden, in certain circumstances, into something like “ideology,” systematically foreclosing particular conceptions of the good.⁷⁹

prevent this from happening. Cf. Daniels, *supra* note 30, at 258 (“Assuming these rational agents value equal liberty as strongly as Rawls says they do, they would not want to risk losing that equal liberty.”).

⁷⁸ See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207, 208-09 (1973).

⁷⁹ See, e.g., Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 542-34 (1982) (“Male power is real; it is just not what it claims to be, namely the only reality. Male power is a myth that makes itself true. What it is to raise consciousness is to confront male power in this duality: as total on one side and as a delusion on

Furthermore, culture is one of the vital fields in which conceptions of the good are presented, worked out, revised, and evaluated in public.

If the picture I draw of cultural power is right, the ability of certain actors to accumulate cultural capital and exercise disproportionate power over the field of culture that prevents other citizens from participating in the give and take of cultural life, which in turn enables citizens to form conceptions of the good, is shaped by the rules established by political society that circumscribe the space of culture's public facility.⁸⁰ The conclusion of this second step is that, because of the extent to which conceptions of the good are endogenous to the articulations of these conceptions in cultural space, in order to fully develop and realize the second moral power, citizens must be able to participate in the culture-process, expressing their conceptions of good in the shared facility of culture.⁸¹

In light of the possibility that access to cultural space will be distorted by (otherwise permissible) inequalities in wealth and power in much the same way that political space will be so distorted without Rawls's proviso, and because such a distortion will similarly undermine the capacities of the parties to social cooperation to develop the two moral powers over the course of their lives (albeit with an emphasis on the second moral power rather than the first), the third step of my argument is that it is necessary for a Rawlsian political theorist to modify the two

the other. In consciousness raising, women learn they have *learned* that men are everything, women their negation, but that the sexes are equal. The content of the message is revealed true and false at the same time; in fact, each part reflects the other transvalued. If 'men are all, women their negation' is taken as social criticism rather than simple description, it becomes clear for the first time that women *are* men's equals, everywhere in chains. Their chains become visible, their inferiority—their inequality—a product of subjection and a mode of its enforcement. . . . Feminism has unmasked maleness as a form of power that is both omnipotent and nonexistent, an unreal thing with very real consequences.”).

⁸⁰ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 176-211 (2006); LAWRENCE LESSIG, *FREE CULTURE* (2004); TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 159-67 (2011).

⁸¹ Cf. Galston, *supra* note 58, 877-78.

principles of justice with a second proviso, of semiotic justice.⁸² The proviso of semiotic justice provides the following:

(1) The worth of all cultural liberties to all citizens, whatever their economic or social position, must be sufficiently equal in that all have a fair opportunity to contribute to public cultural expression and to affect the shape of cultural space and so on.

As with the proviso of the fair value of the equal political liberties, this idea “parallels that of fair equality of opportunity in the second principle.”⁸³

(2) Furthermore, when the parties adopt the two principles of justice in the original position, they understand the first principle to include the proviso of semiotic justice.

When integrated into Rawls’s account of justice, semiotic justice will lead to the inclusion in the first principle of justice “a proviso that the equal political liberties, [*and the cultural liberties,*] and *only* these liberties, are to be guaranteed their fair value.”⁸⁴

Why would we want to integrate this proviso into the first principle, rather than adopting it as a clarification of what the principle of fair equality of opportunity together with the difference principle means for laws regulating culture in the legislative and judicial stages? The reason is that the urgency of the cultural liberties is so great that they number among the constitutional essentials: if these liberties are not guaranteed, citizens risk losing the opportunity to develop their second moral power, a risk that they must be unwilling to take, given Rawls’s political conception of the person. The constitutional essentials, those items necessary for a

⁸² Cf. RAWLS, *supra* note 3, at 149.

⁸³ RAWLS, *supra* note 3, at 149.

⁸⁴ RAWLS, *supra* note 3, at 149.

constitution to be legitimation worthy, include the first principle of justice along with some narrow principle “requiring an open society, one with careers open to talents” and a “social minimum providing for the basic needs of all citizens.”⁸⁵ The principle of an open society and the social minimum are much narrower than the principle of fair equality of opportunity and the difference principle, respectively, but the first principle in its entirety is a constitutional essential. That the proviso of semiotic justice is a constitutional essential is not the same as saying that it should be judicially enforceable.⁸⁶ That is, a constitution could include the proviso of semiotic justice, but this proviso might be accompanied by a “judges, keep out” sign, like the Indian constitution and its list of “Directive Principles of State Policy,” leaving enforcement of the proviso up to the legislature, the executive, and the citizens themselves.⁸⁷

C. Rawlsian Objections

A Rawlsian might respond to my project by asking: why doesn’t the first principle of justice, by itself, require that the basic structure be constituted in a way that does not allow the accumulation of cultural capital in a small number of hands?⁸⁸

There are three reasons why not. First, when the parties to the original position deliberate about the principles of justice, they “know all general facts about human society.”⁸⁹ I take my picture of the economics of culture to be part of these general facts, and I do not take it as being wholly determined by the basic structure of a political society. In other words, however the basic structure of society is constituted, cultural space will tend to be limited (because it, like politics,

⁸⁵ RAWLS, *supra* note 3, at 47-48.

⁸⁶ See Frank I. Michelman, *The Constitution, Social Rights and Liberal Political Justification*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 21, 26 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

⁸⁷ See INDIA CONST. art. 37.

⁸⁸ I would like to thank Seana Shiffrin for raising this question.

⁸⁹ Henry S. Richardson, *Rawlsian Social-Contract Theory and the Severely Disabled*, 10 J. ETHICS 419, 440 (2006).

is a shared public facility), and cultural power will tend to accumulate.⁹⁰ I take this as a descriptive fact about how culture works. Thus, the basic structure must be designed in a way to counteract the effects of this feature of culture, rather than in a way that prevents this feature from arising in the first place.⁹¹

Second, by negative implication, Rawls's description of the fair value of the equal political liberties suggests that, absent a proviso similar to that provided for the fair value of the political liberties, expressive cultural liberties are equally likely to have different values for different people and to be worth less for those who are the worst off in a political society that satisfies the difference principle. The basic liberties guaranteed by the first principle are "equal" basic liberties, and the equality of these liberties is required in "our capacity as citizens to be free and equal" because "we would not put our basic rights and liberties at risk so long as there is a readily available and satisfactory alternative."⁹² Basic liberties, including rights of free expression, are each "of fundamental importance"; they are liberties that we want to ensure that *everyone* has and are not willing to gamble with.⁹³ Furthermore, given my description of the economics of culture, the very nature of expressive liberties gives rise to the possibility of great inequalities in the cultural space under conditions of inequality permitted by the difference

⁹⁰ Cf. Daniels, *supra* note 30, at 257 ("If one thought that the mechanisms through which unequal wealth operates to destroy equal liberty were simple and insoluble, then perhaps constitutional provisions could be devised to solve the problem. Rawls, for example, suggests constitutional provisions for the public funding of political parties and for the subsidy of public debate (pp. 225-6). But there is little reason to believe that the mechanisms are so simple and that such safeguards would work.").

⁹¹ I take this as an illustration of the principle that the principles of justice can be arrived at from a specification of the initial choice situation in which the cooperating parties deliberate or, vice versa, the conditions of the initial choice situation can be defined by working from a particular set of principles of justice. See Richardson, *supra* note 89, at 429. Here, I change the conditions of the initial choice situation of the original position by specifying the general facts known by the parties to include the facts about the economics of culture that I have described.

⁹² RAWLS, *supra* note 3, at 104.

⁹³ RAWLS, *supra* note 3, at 104.

principle. This might be remedied by interpreting the basic liberties as something more than negative guarantees that the government will not interfere with citizens, treating liberties of free expression as requiring not only that all citizens have a chance to speak, but also that they have the chance to be heard.

This leads to my third reply: this approach of guaranteeing the fair value of expressive cultural liberties by defining the liberties themselves to include a requirement of their fair value would work equally well for the equal political liberties; rather than appending a proviso to the first principle of justice to ensure that the political liberties have their fair value for all, Rawls might have defined the equal political liberties to include “the equal opportunity to hold public office and to affect the outcome of elections, and the like.”⁹⁴ This would have had the same effect as the proviso, but would have operated as an interpretation of the values themselves. This is why Rawls is able to state that the proviso of the fair value of the equal political liberties is to be understood as part of the first principle, rather than as an independent, freestanding principle of justice. The proviso of semiotic justice, like the proviso of the fair value of the equal political liberties, can be understood as a precisification of the first principle of Justice as Fairness; it is an explanation of how the first principle *does itself* require that cultural expressive liberties be given their fair value, rather than a freestanding principle.

Alternatively, a Rawlsian might respond by saying that there is no need to turn semiotic justice into a constitutional essential.⁹⁵ The fair value of the political liberties is a constitutional essential, because of the usefulness of these liberties in making the whole basic structure

⁹⁴ RAWLS, *supra* note 3, at 149. It could be that a similar move could not be made with respect to expressive liberties because the equal value of political liberties is of central importance; but Rawls is committed to guaranteeing the equality of *all* of the basic liberties, not just the political liberties. See RAWLS, *supra* note 3, at 105.

⁹⁵ I would like to thank Frank Michelman for raising the objection described in this paragraph.

function effectively and justly. The Rawlsian might say, put together the following pieces of justice as fairness: first, guarantees in the first principle of freedom of conscience; second, the likelihood that there would be some overlap in practice between semiotic justice and the guarantee of the fair value of the political liberties; third, the difference principle; fourth, the principle of fair equality of opportunity operating at the legislative stage. The Rawlsian might ask, why is that set of factors not good enough to ensure that they cultural liberties actually have their fair value? These guarantees, the Rawlsian might insist, should be plenty to ensure that everyone has the best chance to participate in culture that they possibly can have, consistent with the other requirements of justice. For instance, the fair equality of opportunity likely requires the enactment of anti-trust laws at the legislative stage. Fair equality of opportunity is precisely about the equal opportunity to fully and adequately develop and exercise the first and second moral powers, so, if the description that I have provided above of the culture industries is accurate, it would likely also require the legislature to adopt anti-trust-like laws designed to counteract accumulations of cultural power. What difference does it make to put this into the constitution, rather than to leave it in the legislative stage?

I will answer this objection by looking to the reasons that Rawls offers for treating the fair equality of the political liberties as a constitutional essential. I will argue that the reasons for including semiotic justice in the first principle are just as compelling as the reasons that Rawls offers for the political liberties, and that these reasons provide a plausible rationale for distinguishing the cultural liberties from other basic liberties, the fair value of which will be provided for *after* the constitutional stage.

Why is it that Rawls's fair value proviso for the equal political liberties needs to be part of the first principle, rather than postponed to the legislative stage? Rawls suggests that the

political liberties are of special importance, because “unless the fair value of these liberties is approximately preserved, just background institutions are unlikely to be either established or maintained.”⁹⁶ In other words, if the fair value of the political liberties is not guaranteed from the get-go, it will be difficult or impossible for a society to set up the background institutions necessary for the first and second principles to be realized. The special treatment of the equal political liberties is not because “participation by everyone in democratic self-government is regarded as the preeminent good for fully autonomous citizens.”⁹⁷ Indeed, in the modern world, these liberties are bound to be less meaningful to most citizens than are the other basic liberties.⁹⁸ Rather, the fair value of the political liberties must be guaranteed as part of the first principle “because it is essential in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality.”⁹⁹ By guaranteeing the fair value of the political liberties at the outset, before the legislative stage is reached, a society can ensure that everyone will be able to fairly participate in the legislative process. If all citizens are able to have their voices heard by the legislature, this will ensure that “the other basic liberties are not merely formal.”¹⁰⁰ Like Chief Justice Warren’s description of the right to vote freely as “preservative of other basic civil and political rights,”¹⁰¹ or John Hart Ely’s advocacy of “a representation-reinforcing approach to judicial review” that is “entirely supportive of . . . the underlying premises of the American system of representative

⁹⁶ RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 327-28.

⁹⁷ RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 330.

⁹⁸ RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 330.

⁹⁹ RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 330.

¹⁰⁰ RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 330.

¹⁰¹ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). I would like to thank Frank Michelman for suggesting this example.

democracy,”¹⁰² the fair value of the equal political liberties is particularly urgent because it makes the political system work, which in turn ensures that the other basic liberties will be realized. The legislative stage cannot take care of the fair value of the political liberties if access to that stage was not itself fair. The reasons for treating the political liberties proviso as part of the first principle, and hence as part of the constitutional essentials, seem to boil down to the claim that it is “more urgent to settle” the fair value of the political liberties than of the other basic liberties.¹⁰³

My response to this objection has two prongs. In addition to explaining why semiotic justice is urgent and it is a constitutional essential, my response also engages with the non-liberal or anti-liberal concern that by basing my approach to cultural rights on a political conception of the person, I am subordinating culture to politics. The first prong of my response runs as follows: the contours of culture shape what is politically possible. Certain forms of life appear as “necessary” or “impossible” because of settlement of both politics and culture.¹⁰⁴ At the very

¹⁰² JOHN HART ELY, *DEMOCRACY AND DISTRUST* 88 (1980).

¹⁰³ RAWLS, *supra* note 3, at 49. This is one of the four grounds that Rawls offers for distinguishing the constitutional essentials from the requirements of the second principle. The other grounds, which are not as clearly invoked by Rawls’s explanation of why the fair value of the political liberties is part of the first principle, are that “[t]he two principles apply to different stages in the application of principles and identify two distinct roles of the basic structure,” that “[i]t is far easier to tell when those essentials are realized,” and that “[i]t seems possible to gain agreement on what those essentials should be, not in every detail, of course, but in the main outlines.” RAWLS, *supra* note 3, at 49.

¹⁰⁴ See UNGER, *supra* note 62, at 564 (“There are stock situations and—at least so far as these current means of expression go—stock responses to them. A table of correspondences arises between what people feel, or are supposed to be capable of feeling, in the recurrent circumstances of social life and the combined ways of acting, talking, and looking that convey the subjective response.”); see also ROBERTO MANGABEIRA UNGER, *THE SELF AWAKENED: PRAGMATISM UNBOUND* 49 (2007) (“Every culture must draw the line between the alterable features of social life and the enduring character of human existence. When we understate the extent to which the whole order of society and culture represents a frozen politics . . . we become the slaves of our own unrecognized creations, to which we bow down as if they were natural and even sacred.”).

least, the interpretation and assessment of “complex social and economic information” that the parties carry out at the legislative stage will depend to a large extent on what arrangements the legislators think are impossible or necessary, which will in turn depend on the prevailing cultural arrangements.¹⁰⁵

For instance, suppose that all (or almost all) of cultural expression in given society is characterized by expressions of the beliefs that “the relation of male to female is that of natural superior to natural inferior”¹⁰⁶ and that “a man’s and a woman’s temperance differ.”¹⁰⁷ Against such a cultural backdrop, would it be possible for cooperating members of society to conclude that gender is “fixed natural characteristic[] . . . used as grounds for assigning unequal basic rights, or allowing some persons only lesser opportunities” such that the position that the characteristic of gender specifies is a “point[] of view from which the basic structure must be judged”?¹⁰⁸ It seems likely that, if the cultural understanding of gender were thick enough, there would not be any reason to see gendered differences in distribution as requiring any sort of special scrutiny. If all of the least advantaged members of a society turned out to be women, this would not provide any reason for suspicion about the justice of the basic structure: women are naturally ruled by men, so it should not come as any surprise if most government offices are held by men. Furthermore, this difference might be seen to be to the advantage of women: their

¹⁰⁵ RAWLS, *supra* note 3, at 48.

¹⁰⁶ ARISTOTLE, POLITICS 1254^b13-15 (C.D.C. Reeve trans., 1998). In Janet Halley’s terminology, this might be described as the belief that $m > f$. See JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 17 (2006).

¹⁰⁷ ARISTOTLE, *supra* note 106, at 1277^b20. In Janet Halley’s terminology, this might be described as the belief that m/f . See HALLEY, *supra* note 106, at 18.

¹⁰⁸ RAWLS, *supra* note 3, at 65.

temperament is fundamentally different from that of men, and they do not benefit from offices that require them to lead public lives.¹⁰⁹

In such a society, claims about gender would not present themselves as political claims. Indeed, the political discourse of the hypothetical society may be completely devoid of any discussion of gender. Claims about gender would instead present themselves as “general commonsense facts of human psychology,”¹¹⁰ and as straightforward truths about the world.¹¹¹ Perhaps Rawls’s political conception of the person in its articulation through the two principles of justice could solve much of this problem. The use of primary goods to measure welfare in the difference principle should mean that women at least are guaranteed access to as many primary goods as men.¹¹² And the first part of the second principle will at least ensure that a system of “careers open to the talents” prevails, and will also ensure that women who wish to pursue the talents necessary for a career that requires them have access to resources like education necessary to do so.¹¹³ The first principle will also guarantee that all of the basic liberties are, at

¹⁰⁹ My description of a hypothetical society is, obviously, very simplified relative to any real human society, but I hope that it nevertheless illustrates how culture can inform what is possible in politics without itself being explicitly political.

¹¹⁰ RAWLS, *supra* note 3, at 101.

¹¹¹ See *supra* note 79 (quoting Catharine MacKinnon’s description of “[m]ale power [as] a myth that makes itself true”).

¹¹² Strict Marxists might think that this, by itself, should solve any problems of gender inequality, such inequalities being merely super-structural expressions of underlying economic inequalities. But Marxist-Feminists such as Selma James recognize that “[r]acism and sexism train[] us to acquire and develop certain capabilities at the expense of all others” and “[t]hen these acquired capabilities are taken to be our nature and fix our functions for life, and fix also the quality of our mutual relations,” such that “planting cane or tea is not a job for white people and changing nappies is not a job for men and beating children is not violence.” JAMES, *supra* note 60, at 14.

¹¹³ The fair equality of opportunity requires that
supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason. In all parts of

the least, formally open to women as well as men. But ensuring that these liberties have their fair value to women seems much harder to do: women might not participate in public cultural expression but, the hypothetical society might say, there is no reason that this is unfair; it is simply a reflection of the lesser talent of women, who have the rights to write novels and act in plays but simply choose not to do so because of their feminine temperament or their lack of talent. If it so happens that, over time, it becomes harder and harder for women to participate in shaping the culture because networks that control access to cultural production are controlled by men who share the background cultural beliefs about gender, this may be no cause for concern, because the people getting shut out from cultural production are the people with less talent.¹¹⁴ At the legislative stage, when the legislators are making complex inferences about social and economic facts, it is difficult to see how justice as fairness might adequately exclude the cultural background that shapes beliefs about the reality of gender.¹¹⁵ Perhaps the presence of women in politics, encouraged by the proviso of the fair value of the equal political liberties, would solve this. But I see no reason why that would necessarily be the case: the thick cultural belief about

society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed.

RAWLS, *supra* note 3, at 44.

¹¹⁴ The Rawlsian objector might step in here and say, “wait a minute! That accumulation of power seems to violate fair equality of opportunity.” But I think that in a society that operates with a definition of “native endowments” that sees gender as part of one’s endowment of talent to accomplish particular aims, the hypothetical society’s interpretation of fair equality of opportunity may be permissible. To avoid running afoul of the difference principle, it might at least be necessary for women to have other opportunities open to them, but this is perfectly possible. Women might, for instance, have opportunities that men do not have to excel in domesticity.

¹¹⁵ Even if parties to the original position think that, put together, these constitutional constraints would solve at least the worst problems of the Aristotelian ideology of gender that I described, as long as they think that there is some reasonable chance that the ideology might sustain itself in the face of these safeguards, they might be hesitant to proceed without some further guarantee that the cultural liberties really have their fair value for everyone in society. See Rawls, *supra* note 3, at 102 (“Their responsibility as trustees for citizens so regarded does not allow them to gamble with the basic rights and liberties of those citizens.”).

gender that I described applies equally to all domains of the hypothetical society. Women may participate in government in this society, and may even think of themselves as *political* equals of men, but may remain committed to the *social* inequality of men and women.¹¹⁶

Now, perhaps this hypothetical society is not so bad; at the very least, with all of its constitutional safeguards in place, it looks like the sort of decent hierarchical society that Rawls thinks liberal societies should tolerate.¹¹⁷ But it seems hard to believe that this is a society that satisfies the requirements of liberal justice, and it certainly looks unattractive to anyone committed to sex equality “in the sense of parity of rank among [sex-defined] social groups.”¹¹⁸ Without a constitutional guarantee of the fair value of the cultural liberties, clearly spelling out that the liberties of participating in culture really should have roughly the same worth for all citizens, regardless of what we happen to think of their temperaments.¹¹⁹ Constitutionalizing semiotic justice matters because it will prevent trade-offs from taking place between the worth of cultural liberties and the worth of other basic liberties. Just as securing the fair value of the political liberties is particularly urgent, so too is ensuring the fair value of the cultural liberties. This is not because guaranteeing semiotic justice will immediately solve the problems of sex inequality in my hypothetical society; rather, it is because the cultural liberties are, like the political liberties, particularly useful in this situation. First, they are particularly useful because they are necessary for citizens to develop the second moral power, as I have argued above. Second, my hypothetical society is premised on cultural beliefs about a culture where a certain set of cultural beliefs about the world (that are not explicitly political beliefs) make only a small

¹¹⁶ Cf. CATHARINE MACKINNON, *SEX EQUALITY 2* (2d ed. 2007).

¹¹⁷ See JOHN RAWLS, *THE LAW OF PEOPLES* 62-70 (1999).

¹¹⁸ MACKINNON, *supra* note 116, at 2.

¹¹⁹ This might not solve all of the problems in my hypothetical society. For instance, there would still be the question of what it means to be worth “the same.”

set of social arrangements appear to be possible to both citizens and legislators. Guaranteeing the fair value of the cultural liberties makes it possible for members of a society to have a chance to challenge the culture that makes some social arrangements seem possible and others impossible.

This leads directly to the second prong of my response to the Rawlsian objection. The fair value of cultural liberties is particularly urgent because guaranteeing such liberties is necessary to create the conditions necessary for political philosophy to do its work. The political philosophizing that gives rise to the political conception of the person is worked up from the “public political culture of a democratic society, its basic political texts (constitutions and declarations of human rights), and in the historical tradition of the interpretation of those texts.”¹²⁰ This means that if there are blind spots in the historical traditions in which justice as fairness goes to work, justice as fairness is likely to suffer from similar oversights.¹²¹ Furthermore, as a rationalizing endeavor,¹²² political philosophy is ill suited to discover these oversights.¹²³ However, a commitment to making culture open, to allowing the conditions against which political philosophy grows up to be contested by all of the people of a cooperating

¹²⁰ RAWLS, *supra* note 3, at 19.

¹²¹ One piece of evidence for this claim is that Rawls’s theory of justice has frequently been criticized (sometimes fairly, sometimes not) for failing to pay sufficient attention to global justice, *see, e.g.*, Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFFS. 251 (1999), women’s rights, *see, e.g.*, Susan Miller Okin, *Justice and Gender: An Unfinished Debate*, 72 FORDHAM L. REV. 1537 (2004), disability, *see, e.g.*, Martha C. Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens*, 30 PHI. TOPICS 133 (2002), and obligations to non-human animals, *see, e.g.*, MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 325-407 (2006), all topics that have, arguably, often been overlooked in the history of political society in the United States.

¹²² *See, e.g.*, RAWLS, *supra* note 3, at 3 (discussing how philosophy can play the role of reconciliation, “calm[ing] our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form”)

¹²³ *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 92 (1989).

society, provides an avenue to address these oversights. Interventions in culture can bring to light previously unrecognized ways of life,¹²⁴ providing resources with which individuals may develop their conceptions of the good and showing philosophers where political philosophy should play its “realistically utopian” role, “probing the limits of practical political possibility.”¹²⁵ As Richard Rorty writes, “pain is nonlinguistic: it is what we human beings have that ties us to the nonlanguage-using beasts. So victims of cruelty, people who are suffering, do not have much in the way of a language.”¹²⁶ In other words, even if a political society is deeply committed to addressing the problem of suffering whenever it encounters it, it may be difficult to notice suffering when it occurs if it is not expressed in the shared space of culture and language. “So the job of putting their situation into language is going to have to be done for [the victims of suffering] by somebody else. The liberal novelist, poet, or journalist is good at that. The liberal theorist usually is not.”¹²⁷ Cultural participation is the sort of expression that creates the conditions of awareness that political philosophy can then work to incorporate, seeking out voices that cannot be understood in the realm of political philosophy unless they are first articulated in cultural space.¹²⁸ Guaranteeing the fair value of the cultural liberties is of similar

¹²⁴ See RORTY, *supra* note 123, at 94 (explaining that “‘literature’ (in the older and narrower sense), as well as ethnography and journalism, is doing a lot” for freedom and equality); *see also* CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) (discussing culture as a semiotic system).

¹²⁵ See RAWLS, *supra* note 3, at 4.

¹²⁶ RORTY, *supra* note 123, at 94.

¹²⁷ RORTY, *supra* note 123, at 94; *see also* Martha C. Nussbaum, *The Supreme Court 2006 Term Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 97 (2007) (“Who could possibly say that laws against miscegenation impose equal disabilities on both black and white? Only someone who stands so far away from real life that the suffering of exclusion cannot be seen. . . . The [Capabilities Approach] says: Don’t be like that. Get some experience. Learn about the world. Use your imagination.”).

¹²⁸ Julie Cohen discusses how the Gadmerian, “to and fro” play of culture, which is “neither entirely random nor wholly ordered . . . supplies the unexpected inputs to creative processes, fuels serendipitous consumption by situated users, and inclines audiences toward the new.”

urgency to guaranteeing the fair value of the political liberties because the cultural background against which politics works, and which informs its conception of the person as well as providing it with general commonsense knowledge with which to understand the world, determines what sort of institutional arrangements appear reasonable from the perspective of politics and which do not. Guaranteeing the fair value of the cultural liberties is essential in order to establish an understanding of what the world is like that the members of a cooperating society can agree on and to ensure that the ability to develop and pursue conceptions of the good is a real opportunity to do so, rather than merely an opportunity to endorse the prevailing conceptions of the good in a cooperative society.¹²⁹

Non-liberals might remain concerned that my argument still boils down to politics in the end, but my argument does so only because it is a political theory, and speaking the voice of politics, as a sphere that is semi-autonomous from culture, just as culture is semi-autonomous from it, requires returning to the space of politics after exploring the world of culture, using its insights as a resource to make politics more flexible and inclusive, and speaking of culture through politics. As justice as fairness moves back and forth between considered judgments made in a thick social context and considered highly general convictions, it learns from the play of cultural life, where conceptions of the good are developed and deployed.

The final objection to semiotic justice that I will explore briefly is Rawls's objection that guaranteeing the fair value of basic liberties other than the equal political liberties is socially divisive. The answer to this objection is that this guarantee is not socially divisive. First, this is

Cohen, *supra* note 2, at 1191-92. The unpredictability of culture's movements in response to inputs provides a further resource for destabilizing and rethinking political theory.

¹²⁹ Cf. RAWLS, *POLITICAL LIBERALISM*, *supra* note 23, at 330 ("The guarantee of fair value for the political liberties is included in the first principle of justice because it is essential in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality.").

because guaranteeing the fair value of the cultural liberties is particularly urgent, as is guaranteeing the fair value of the political liberties. Second, it is not socially divisive because semiotic justice does not articulate a preference for certain conceptions of the good rather than others within the space of culture that it opens up. This is not to say that semiotic justice is indifferent among all possible conceptions of the good; it certainly excludes conceptions of the good that, for instance, require a closed or static culture. However, as illustrated by Figure 1, within the space of cultural contestation, semiotic justice commits to neutrality among competing conceptions of the good (to the extent that such conceptions do not clash with the requirement of semiotic justice itself). Justice as fairness identifies certain “worthy” forms of life and provides sufficient space within itself for those ways of life while also excluding other forms of life.¹³⁰ This is permissible for Rawls because the exclusion of some ways of life is based on a political conception of justice that is, “or can be, shared by citizens regarded as free and equal” and “do[es] not presuppose any particular fully (or partially) comprehensive doctrine.”¹³¹ Similarly, the preferences that semiotic justice does have for some forms of life rather than others are rooted in the political conception of the person as having the first and second moral powers rather than in any commitment to a particular comprehensive conception of the good.¹³² Semiotic justice sets up a space of culture, and while it may foreclose the development of conceptions of good outside of that space, it commits to allowing all of the different conceptions of the good that are able to fit within that space to play out against one another.¹³³

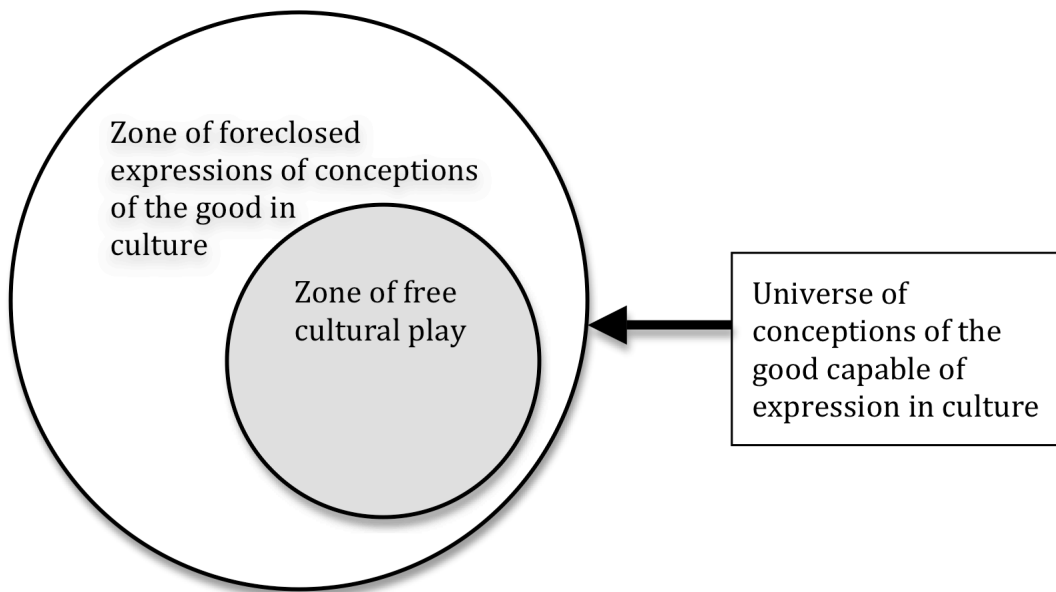
¹³⁰ RAWLS, *supra* note 23, at 174.

¹³¹ RAWLS, *supra* note 23, at 176.

¹³² I will return to the tricky question of how easily semiotic justice will actually be able to maintain neutrality of aim in the context of copyright law in Part III, *infra*.

¹³³ One additional question that a Rawlsian might ask of my theory is whether it is possible to maintain a distinction between cultural and political liberties and other basic liberties. Answer: Yes, because of the connection of these liberties to the first and second moral powers,

Fig. 1. Cultural Space in Semiotic Justice



D. Implications for Rawls's Political Conception of the Person

Does this account of culture require modifications to Rawls's political conception of the person? Answer: Yes, it requires revisions to Rawls's account of how freely people chose their own ends under reasonably favorable democratic conditions. For Rawls, the person is conceptualized as a free rational person reaching agreement with other free rational persons, and is understood to reach reciprocal agreement as a citizen with other citizens. What the person cares about is the establishment of the right sort of political arrangements, full stop. The reciprocal cooperation that the members of a cooperating society agree upon is cooperation *as citizens*. Elevating cultural liberties to the level of a constitutional essential reflects a concern with something other than citizenship; on par with the political aims of the Kantian persons is now a commitment to creating a space in which people can pursue and revise conceptions of the good *with each other*. In this way, twisting Rawls's theory to give extra protection to cultural

respectively, and because of my demonstration of the urgency and usefulness of cultural liberties relative to other liberties in this Part.

liberties and to address the possible problems of semiotic injustice pushes Rawls's boat out of his Kantian harbor. But perhaps by putting the second moral power on par with the first, Rawls has already irretrievably left Kantian waters, with respect to this particular aspect of his political theory. Rawls's account of the parties to the original position as reciprocal cooperators might still be sustained but the reciprocity cannot be simply reciprocity *as citizens*.¹³⁴

II. SEMIOTIC JUSTICE OUTSIDE THE ORIGINAL POSITION: A BENCHMARK FOR LAW

I now move from the level of ideal political theory down to constitution making, legislation, and adjudication, developing an account of how to apply the insights of Part I to a world already inhabited by legal and political institutions that shape cultural expression and consumption. In Part I, I developed the claim that a guarantee of "semiotic justice," providing for the fair value of the cultural liberties, is a constitutional essential. In order for a constitution to be legitimation worthy, this proviso must be satisfied.¹³⁵ This tells us that, if we were to draft the United States Constitution today, we would probably write a very different copyright clause than what we have now, if we wanted a legitimation-worthy constitution.¹³⁶ However,

¹³⁴ Cf. C. Edwin Baker, *Rawls, Equality, and Democracy*, 34 PHIL. & SOC. CRITICISM 203, 241 ("Arguably, Rawls laid the groundwork for this alternative in the ways he broke from Kant (TJ, 256). Rawls assumed that '[t]he person's choice as a noumenal self . . . to be a collective one' (TJ, 257). My suggestion is that he failed to follow through when he treated individualized natural attributes, possession of the two moral powers, as the basis of people's equality. Rather, fundamental equality of noumenal beings engaged in collective choices lies in people's basic relational practices, of which communicative action provides a morally generative instance. By beginning with communicative action, this second approach does not reject the significance of the two moral powers but sees their moral relevance as lying precisely within cooperative ventures (of communication action or societal cooperation).").

¹³⁵ As Frank Michelman notes, "[a] legitimation-worthy constitution, if we have one, . . . does important moral work" because "[i]t allows for a kind of proceduralization of judgments regarding the moral permissibility of collaboration in the enforcement of laws of uncertain and disputed moral or other merits." Frank I. Michelman, *Constitutions and Capabilities* (manuscript at 6).

¹³⁶ The current copyright clause says that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

determining whether the legal system of the United State on the whole provides for rough equality in the access to and use of cultural liberties could be very difficult, as there are many areas of law that affect cultural expression and that interact complexly, and “rough equality” is itself a rather ambiguous phrase.

In any event, the proviso of semiotic justice might be more useful to us not as an indicator of whether or not the American constitution is legitimation worthy, but instead as a guide that we might keep in mind as conscientious judges or legislators working to make a constitution that is legitimation-worthy or, in the absence of a constitution that can be made legitimation-worthy, working to implement and apply laws that are morally justifiable in themselves. In this way, semiotic justice can provide “a useful template against which to assess our achievements” and “a norm against to which to assess what we have neglected and failed to protect.”¹³⁷ This is not to say that semiotic justice provides straightforward advice to judges about how to decide copyright cases, as judges operate under many other constraints (including the text of the copyright statute, Congressional intent, precedent, constitutional law, and other fields of law that conflict with copyright law). Instead, semiotic justice offers guidance to the

exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Of course, the proviso of semiotic justice might be written into the constitution elsewhere, serving as a constraint on this grant of power to the Congress. Indeed, the First Amendment might be understood as enacting, at least in part, the proviso as part of the Constitution when it says that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. Nevertheless, as the First Amendment has been interpreted by the Supreme Court, it does not guarantee the fair value of the cultural liberties. Sufficient evidence for this point is provided by the fact that the accumulations of cultural power that I provided in Part I as examples of how the cultural liberties might be denied their fair value arose in the context of American constitutional and copyright law.

¹³⁷ Nussbaum, *supra* note 127, at 8.

political system as a whole (including to citizens *qua* citizens) on what the system of laws regulating and incentivizing culture is doing well and how it might be improved.¹³⁸

Finally, the semiotic justice proviso settles some aspects of the legal and political system, by ruling out a set of possible arrangements of the basic structure that violate the requirement that the cultural liberties should have roughly equal values for all members of a society. However, within the set of arrangements of the basic structure that satisfy this requirement, semiotic justice is indifferent. Thus, semiotic justice leaves a moderately broad range of freedom for political actors to shape the space of cultural expression (within the other constraints of justice as fairness, including the requirement of neutrality of aim), provided that in doing so they do not threaten the requirement of fair equality of opportunity to participate in shaping culture that is embodied in semiotic justice.

III. SEMIOTIC JUSTICE IN AMERICAN COPYRIGHT LAW

In this part, I will bring semiotic justice to bear on presently existing American copyright law and the international system of copyright, assess particular legal dilemmas, and explore what answers to these dilemmas semiotic justice would suggest. In this section, I will designate the Rawlsian theory of justice as fairness as modified by the proviso of semiotic justice as “SJ.” That is, when I say “SJ,” I mean {Rawls’s first principle of justice, as modified by the proviso of the fair equality of the equal political liberties and the proviso of the fair equality of the cultural liberties} plus {Rawls’s second principle of justice}.¹³⁹ On the other hand, when I say “the

¹³⁸ Cf. WILARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW: 9 LOGICO-PHILOSOPHICAL ESSAYS 20, 41 (1961) (“[O]ur statements about the external world face the tribunal of sense experience not individually but only as a corporate body.”).

¹³⁹ See *supra* note 25 and accompanying text (stating Rawls’s first and second principles of justice); *supra* note 43 and accompanying text (stating the proviso of the fair value of the equal political liberties); *supra* notes 82-84 and accompanying text (stating the proviso of semiotic justice).

semiotic justice proviso,” I mean simply the guarantee of the fair value of the cultural liberties, by itself. In this section, I will focus on domestic United States copyright law, taking the United States as a society of the sort of society that Rawls saw his political account of justice as addressing itself to. Copyright is certainly not the only area of law to which SJ applies, or even the only field of intellectual property law that is of considerable importance in shaping the contours of the public facility of culture.¹⁴⁰ Furthermore, there are many uses of copyright law that do not directly touch on the cultural expressive liberties that SJ (or at least the proviso of semiotic justice in particular) is concerned with.¹⁴¹ Nevertheless, the regulation and promotion of cultural expression remains central to the agenda of copyright law, which provides protection to books, magazine, newspaper, and blog articles, poetry, plays, music, architecture, choreography, movies, and visual art.¹⁴²

¹⁴⁰ For instance, trademark can provide protection for fictional characters. *See, e.g.,* Walt Disney Co. v. Powell, 698 F. Supp. 10, 12 (D.C. Cir. 1988) (holding that Disney owned valid trademarks in Mickey and Minnie Mouse), *modified by* 897 F.2d 565 (D.C. Cir. 1990). Another instance is the *sui generis* protection for fashion in the European Union. *See* Council Regulation 6/2002, art. 3, 2002 O.J. (L3) 1, 4 (EC). *Sui generis* fashion protection has also been proposed for the United States in the Design Piracy Prohibition Act. *See* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. § 2(a), (d) (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. § 2(a), (d) (2007).

¹⁴¹ For instance, copyright extends to a cataloging and classification of dental procedures, *American Dental Association v. Delta Dental Plans Association*, 126 F.3d 977 (7th Cir. 1997), maps, at least when the idea embodied in a map is capable of a variety of expressions, *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992), computer software, *Softel, Inc. v. Dragon Medical and Scientific Communications, Inc.*, 118 F.3d 955 (2d Cir. 1997); *see also* Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, art. 1, 1991 O.J. (L-122) 42 (EU Software Directive) (“In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.”), and collections of automobile prices, *CCC Information Services, Inc., v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994). *But see* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 342 (1988) (“It is an oversimplification to think that some genres of intellectual property cannot carry personality.”).

¹⁴² *See* Cohen, *supra* note 2, at 1187 (“Copyright scholars have long recognized that discourses about art play a role in shaping copyright law. . . . At the same time . . . copyright does not

Before exploring particular problems within copyright law, a preliminary question is whether SJ permits, requires, or prohibits copyright law altogether. The proviso of semiotic justice permits but does not require liberal political societies to enact a system of copyright. A copyright system that gives rise to a political economy that allows some individuals to exercise markedly more control over the cultural space than others is certainly out (or, in any event, either such a system of copyright is barred, or some other part of the basic structure that, combined with the copyright system gives rise to such exclusion and that is itself a necessary condition for it, is barred). A system that provided no protection for intellectual property might also be barred by the proviso of semiotic justice, if, for instance, it meant that only people with sufficient wealth to sustain themselves independently of writing are able to write novels or record music, as this might violate the instantiation of the liberal principle of equality of opportunity in the semiotic justice proviso. However, so long as a system of copyright law (or the absence of such a system) does not violate the fair value of cultural liberties, the proviso of semiotic justice allows a broad range of legal arrangement with respect to the rights afforded to authors of cultural works. SJ (consisting of the proviso of semiotic justice plus Rawls's principles of justice) might have more to say about the particular schemes of intellectual property. The difference principle would, for instance, guide political societies to adopt whatever set of political arrangements, including a system of intellectual property, provides the greatest advantage to the least advantaged members of society. Again SJ will provide a significant degree of freedom to liberal political societies to choose what forms of intellectual property they wish to protect, so long as the semiotic justice proviso and the other limitations of political justice are abided by.

simply respond to trends in aesthetic theory; discourses within copyright also shape understandings of art.”).

If SJ allows for a broad range of legal arrangements with respect to the rights of authors of cultural work, what does it have to say about a system of copyright once it has been enacted? Particularly, what might SJ have to say about existing American system of copyright? Given that the United States has already made the decision to use a system of copyright to promote cultural production and to reward producers of cultural material, SJ suggests several principles that might guide decisions about how to develop copyright protection within that system.

A. Elements of Copyrightable Subject Matter

While SJ may not require that a society set up a system of copyright (or for that matter, any other particular system to encourage cultural production, like a prize system or a system of government grants), once a society has decided to set up a copyright system with the aim of encouraging people to create cultural goods, SJ is concerned that all members of society be equally positioned to benefit from this system. This concern is particularly acute if the copyright system provides big rewards to individuals who create cultural products that are read, listened to, or watched by a particularly large number of consumers, since such a system may be particularly susceptible to the aggrandizement of cultural capital in a small number of hands (as cultural influence leads to the accumulation of wealth which then loops back into still more accumulation of cultural power). Once such a copyright system is up and running, it should (1) adopt a broad view of what expression counts as “cultural” expression in order to leave the largest possible zone of free cultural play, (2) aim to ensure that the including certain forms of expression in the copyright system does not compound existing inequalities, and (3) avoid favoring one favoring the expression of one conception of the good over another, except to the extent necessary to

guarantee the fair value of the cultural liberties (and comply with the other requirements of Rawls's first and second principles).¹⁴³

One concrete scenario where this prescriptive advice plays out is the field of copyright protection for useful articles. In *Brandir International, Inc. v. Cascade Pacific Lumber Co.*,¹⁴⁴ the Second Circuit held that a RIBBON bike rack, made of bent metal tubing, was not eligible for copyright protection, because “the form of the rack [was] influenced in significant measure by utilitarian concerns and thus any aesthetic elements [could not] be said to be conceptually separable from the utilitarian elements.”¹⁴⁵ The owner of Brandir, who created the bike rack, was a sculptor who created wire sculptures out of “continuous undulating piece[s] of wire.”¹⁴⁶ When a friend informed him that his wire sculptures would make good bike racks, he made some changes to one of his wire sculptures to make it a better bike rack, including widening the upper loops of the wire to allow bikes to be parked “under . . . as well as over” the rack's curves.¹⁴⁷ The court determined that, because “the ultimate design [of the RIBBON Rack was] as much the result of utilitarian processes as aesthetic choices,” it was, in its final form, “the product of industrial design” rather than a work of minimalist sculpture.¹⁴⁸

SJ views the outcome of *Brandir* as inconsistent with the fair value of cultural liberties for two reasons. First, *Brandir* expresses a preference for one form of cultural expression (non-utilitarian art) to another (industrial design). Both forms of expression fall within the broad conception of culture upon which SJ is premised, and, given a background system of copyright

¹⁴³ See *supra* fig. 1.

¹⁴⁴ 834 F.2d 1142 (2d Cir. 1987).

¹⁴⁵ *Brandir International, Inc.*, 834 F.2d at 1147; see also 17 U.S.C. § 101 (2006) (subjecting “useful articles” to a test of “separability” of their utilitarian and “pictorial, graphic, or sculptural features” as a prerequisite for copyright protection).

¹⁴⁶ *Brandir International, Inc.*, 834 F.2d at 1146.

¹⁴⁷ *Brandir International, Inc.*, 834 F.2d at 1146.

¹⁴⁸ *Brandir International, Inc.*, 834 F.2d at 1147.

rules that roughly meet the requirements of SJ, extending copyright protection to either form of expression would not prevent the realization of the fair value of other cultural liberties. Both forms of expression, therefore, fall within the zone of free cultural play, and SJ's commitment to neutrality within this zone suggests that copyright protection should not be denied to the RIBBON Rack simply because its design was influenced by utilitarian impulses as well as creative impulses. Second, recognizing minimalist sculpture but not industrial design as eligible for copyright protection may compound inequalities. It seems a reasonable assumption that creating minimalist sculpture professionally is a more elite and exclusive activity than industrial design: fine artists have often received extensive formal or informal training and have accumulated significant cultural capital in the form of knowledge about how to create art that satisfies the demands of a rarefied market. There are likely more people who design objects with some utilitarian ends in mind than there are professional fine artists.¹⁴⁹ Just because industrial designers have some utilitarian objective in mind does not imply that they do not simultaneously have aesthetic objectives, as *Brandir* illustrates. In order to keep the field of cultural production as open as possible to as many people as possible, and to prevent the aggrandizement of cultural power in a small number of professional artists working as taste-makers, SJ would resist the holding in *Brandir*, preferring instead a test for separability closer to Judge Newman's temporal displacement test in his dissent in *Carol Barnhart Inc. v. Economy Cover Corp.*,¹⁵⁰ which would provide protection to articles that "stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function."¹⁵¹ Such a test would be acceptable from the standpoint of SJ because it draws a significantly broader line around the zone of cultural play,

¹⁴⁹ Note that the disparity between high art and industrial design is one of cultural capital, not necessarily a financial disparity.

¹⁵⁰ 773 F.2d 411, 419 (2d Cir. 1985) (Newman, J., dissenting).

¹⁵¹ *Carol Barnhart Inc.*, 773 F.2d at 422 (Newman, J., dissenting).

letting in any object that a participant in the cultural space can understand as a form of cultural expression. Cutting out forms of expression from this zone¹⁵² that ordinary participants cannot understand as cultural also does not undercut the rationale for constitutionalizing the guarantee of the fair value of cultural speech, because the ability of expression to change a cultural system in a manner that might correct errors in the political system depends on engaging with culture and speaking in a manner that can be heard by other participants in culture.¹⁵³ (In other words, uttering nonsense is unlikely to effect any change to a cultural space, unless I can show other participants in the space how uttering nonsense somehow engages with that cultural space.)

SJ's take on copyright for useful articles can be extended to state that the principle announced by Justice Holmes in *Bleistein v. Donaldson Lithographing Co.* is a high point in American copyright law.¹⁵⁴ Holmes proclaimed that

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed

¹⁵² Cutting a form of expression off from the zone of cultural free play does not mean that the expression receives no legal or constitutional protections. In the American system of constitutional law, speech that cannot be understood by ordinary participants in the cultural space as “culture” may still be afforded First Amendment protections. All that cutting off means is that the *fair value* of the form of expression does not need to be guaranteed as a constitutional essential.

¹⁵³ Cf. RORTY, *supra* note 123.

¹⁵⁴ 188 U.S. 239 (1903).

to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value, and the taste of any public is not to be treated with contempt.¹⁵⁵

Although not articulated systematically, this expresses the core of SJ's commitment to neutrality within the zone of cultural play—copyright is not set aside for just one type of art, and it strives to avoid denigrating the potential value of any form of cultural expression that is compatible with a guarantee of the fair value of the cultural liberties.

A question might be raised about SJ's stance on *Brandir* and *Bleistein*. What stance would SJ take with respect to line-drawing in the *Brandir* case if the distinction was not between high art and industrial design or kitsch but was instead between, for example, representational and non-representational art? What would SJ say about a white canvas hung in an art gallery being denied copyright protection on the basis of the idea/expression distinction while a portrait is granted protection?¹⁵⁶ Answer: SJ would hope to avoid affording protection to some forms of expression and not other forms of expression when both engage in the cultural space and avoid explicitly violating the requirements of SJ. But at a certain point, SJ acknowledges, we will have to draw lines to determine what expression receives copyright protection and what doesn't—that is what law does. SJ must remain as neutral as it possibly can among expressions of different conceptions of good in the space that it opens up for cultural expression, but when it is necessary to draw lines in order to keep the system administrable, SJ may do so. What SJ may not do, however, is draw lines in a way that exacerbates existing inequalities. For this reason, a line between representational and non-representational art (assuming that both forms of art were

¹⁵⁵ *Bleistein*, 188 U.S. at 251-52.

¹⁵⁶ I would like to thank Julie Cohen for raising this question.

similar in prestige and exclusiveness) is not as worrying as drawing a line between high art and industrial design, or drawing a line that may have gendered effects, like excluding quilts from intellectual property protection.¹⁵⁷ SJ should try to avoid cutting out any form of cultural expression from the guarantee of the fair value of cultural liberties. Nonetheless, in some circumstances, SJ will need to draw lines, guaranteeing the fair value of some forms of expression but not of others. Provided that this line-drawing really is necessary for the preservation of SJ (either the proviso of semiotic justice or the first or second principle of justice), the line-drawing is permissible unless it exacerbates existing inequalities (in a way that threatens the fair value of the cultural liberties).

This definition of when line-drawing is permissible is another way of saying that SJ will allow the fair some cultural liberties to be restricted for the sake of other liberties when doing so accords with public reason, satisfying the Rawlsian requirement of neutrality of aim. Thus, for instance, SJ might disallow an attempt to prevent people from watching pornography by denying copyright protection to pornographic films and photographs. This outcome is not, however, obvious—if the provision of copyright protection for pornography shapes the cultural facility in such a way that a particular group of people, women, for instance, or many women, are prevented or inhibited from fully realizing the second moral power, SJ might require conditioning the enforcement of copyright protections for pornography “for which the consensuality of the performers cannot be demonstrated.”¹⁵⁸ This is an instance where SJ needs to foreclose the expression of certain conceptions of the good because those conceptions, by their

¹⁵⁷ See Debora Halbert, *Feminist Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL’Y & LAW 431, 443-44 (2006). I would like to thank Julie Cohen for suggesting this example.

¹⁵⁸ Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 838 (2008). I would like to thank Ashley Gorski for pointing me to this source.

very expression, prevent the cultural liberties (and, in the case of pornography, possibly the political liberties¹⁵⁹), from having their fair value.¹⁶⁰

Readers might object to SJ's treatment of the subject matter of copyright and its valorization of *Bleistein* on the grounds that "the postmodernist critique of authorship, originality, and progress" demonstrates that SJ is not capable of really maintaining neutrality when drawing lines to determine what cultural expression has its fair value guaranteed and what does not.¹⁶¹ This objection claims that while SJ can justify its decisions to include certain forms of cultural expression from the guarantee of the fair value of cultural liberties on the basis of its political conception of the person that gives rise to the proviso of semiotic justice, this "political" basis for exclusion really just reflects a decision at the outset of the process of articulating the proviso of semiotic justice to treat some ways of life as worthy and not others.¹⁶²

The response to this objection is two-fold. First, as a constructivist political theory, SJ fully acknowledges that its decisions to include or exclude certain forms of expression are, at root, based on a political embrace of certain conceptions of the good rather than the other, but SJ incorporates a very large number of such conceptions, such that almost any member of a liberal society will be satisfied with the protections afforded their cultural rights by SJ. Second, SJ operates through a process of reflective equilibrium, going back and forth between its specific

¹⁵⁹ See, e.g., Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

¹⁶⁰ Note that this claim is stronger than the claim made about drawing lines between, or example, representational and non-representational art. There, SJ simply says that copyright protection is not *required* (given that a background system of copyright exists). In the case of pornography, under the right empirical conditions, SJ will say that copyright protection is not *permitted* (unless some precondition is satisfied).

¹⁶¹ Cohen, *supra* note 2, at 1164.

¹⁶² Cf. RAWLS, POLITICAL LIBERALISM, *supra* note 23, at 174 (noting that justice as fairness as fairness must draw a "limit" around certain "worthy" ways of life, but explaining that "justice cannot draw the limit too narrowly").

judgments about whether particular forms of expression must be guaranteed their fair value or not and its highly general considered convictions, which enables SJ to open itself to amendment and modification. While no theory of culture and copyright could articulate an infallible theory to explain when copyrights should and should not be enforced, SJ has the advantage of epistemic modesty and a willingness to revisit its abstract commitments in light of what it finds when it goes out to look at the cultures that inhabit it, and that it inhabits.

B. Joint Authorship

SJ seeks to ensure that all people experience the fair value of the cultural liberties. One way of doing this is to ensure that as many people as possible have an opportunity to be authors, singers, or artists. This concern plays out in the context of joint authorship. *Thompson v. Larson*, a case concerning whether Lynn Thomspson, a dramaturg who collaborated closely with Jonathan Larson to heavily revise the script for *Rent*, was a joint author, with Larson, of the musical.¹⁶³ The Second Circuit determined that Thomspson was not a joint author of *Rent*, although she had contributed material to the play that would, by itself, have been eligible for copyright protection.¹⁶⁴ The court held that that joint authorship requires that both authors contribute independently copyrightable material to the work *and* that both parties must intend to be co-authors.¹⁶⁵ SJ sees the *Thompson* rule for joint authorship as unnecessarily limiting the number of people who can partake of the incentives for cultural production. A possible objection is that granting more people rights as joint authors will discourage people from becoming full-fledged authors themselves, since they will be less likely to reap all of the profits for the cultural products that they create. However, it seems more likely that adopting a standard of joint authorship closer to Nimmer's proposed standard (that any contribution is sufficient for joint

¹⁶³ 147 F.3d 195 (2d Cir. 1998).

¹⁶⁴ *Larson*, 147 F.3d at 200.

¹⁶⁵ *Larson*, 147 F.3d at 200-01.

authorship) would provide more equal incentives for people who participate in cultural expression as authors and those who do so as editors and revisers.¹⁶⁶ These are all means of participating in cultural production and, since SJ aims to ensure that as many people as possible have a chance to articulate their conception of the good in the space of culture in some way, SJ sees a world in which many people participate some in cultural expression as superior to a world in which a few people make many contributions to cultural expression, even if it is true that reducing the standard for joint authorship would reduce the incentives for people to become lead authors.

C. Copyright Duration

From the perspective of SJ, the copyright system exists to encourage people to engage in cultural production. At the point that the copyright system restricts the uses to which cultural material can be put without providing benefits in the form of encouragement for authors to engage in cultural production, SJ will not treat these aspects of the copyright system as necessary to preserve the fair value of cultural liberties. If the restrictions imposed on the ability to engage with culture are onerous enough that they inhibit people from engaging in cultural discourse, SJ would treat these restrictions as a violation of the fair value of cultural liberties. In *Eldred v. Ashcroft*, the Supreme Court upheld the Copyright Term Extension Act, which extended the duration of copyright to extend from “creation until 70 years after the author’s death.”¹⁶⁷ Congress extended the term in spite of the fact that “from a rational economic perspective the time difference among these periods makes no real difference.”¹⁶⁸ At the same time, extending

¹⁶⁶ See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07 (2006).

¹⁶⁷ 537 U.S. 186, 195-96 (2003).

¹⁶⁸ *Eldred*, 537 U.S. at 255-56 (Breyer, J., dissenting) (“The present extension will produce a copyright period of protection that, even under conservative assumptions, is worth more than 99.8% of protection in perpetuity . . .”). The majority did not disagree with Breyer’s assessment of economic rationality, but simply stated that it was deferring to Congress on the

the copyright term by twenty years made it significantly harder for authors to engage with and make use of works that would otherwise have fallen into the public domain.¹⁶⁹ Furthermore, the CTEA effectively transferred wealth from the public to authors who held copyrights in popular works created before the enactment of the CTEA.¹⁷⁰ SJ is suspicious of any such wealth transfers, because they are particularly likely to lead to mutually reinforcing accumulations of cultural and economic power. In light of the cost that the CTEA imposed on expression about works that would otherwise have fallen into the public domain, the absence of any beneficial incentive to create new cultural works, and, particularly, the transfer of wealth to existing copyright holders, SJ regards the CTEA as violating the proviso guaranteeing the fair value of the cultural liberties.

D. Fair Use

Given the social and political conditions in which the copyright system is used to encourage cultural production and that fair use is used as a mechanism to ensure that the copyright system does not itself stifle important cultural expression, SJ sees several aspects of fair use as particularly important for the preservation of the fair value of the cultural liberties.¹⁷¹

First, SJ regards privileging creative uses of copyrighted material as valuable, and adopts a broad stance of what constitute “creative uses.” Creative uses are important because the purpose of the semiotic justice proviso is to ensure that everyone has a chance to develop, revise, and pursue their conception of the good in the public facility of culture. Doing so requires making room for creating in a way that allows a fresh articulation of the good by every member

matter. *Eldred*, 537 U.S. at 207 n.15. SJ does not take a stance on whether it is the responsibility of Congress or of the Court to fix the problems of copyright duration.

¹⁶⁹ See NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 175 (2008).

¹⁷⁰ NETANEL, *supra* note 169, at 182-85.

¹⁷¹ SJ would, therefore, likely sympathize with Neil Weinstock Netanel’s description of a “First Amendment-animated fair use doctrine.” NETANEL, *supra* note 169, at 191.

of society, such creativity allowing people to be “big”¹⁷² and also providing resources for both culture and politics to renew themselves.¹⁷³ This means that, while SJ would urge fair use to highly privilege transformative works and parodies, SJ would not require a finding of fair use in a case like *Sony Corporation of America v. Universal Studios, Inc.*,¹⁷⁴ where the use of copyrighted material in question (“time shifting” television shows) was not an activity that could obviously be classified as creative, expressive, or participatory.¹⁷⁵ This is not to say that SJ would argue that *Sony* was *wrongly* decided, but would rather argue that the application of fair use to the facts in *Sony* is not the sort of fair use that SJ *requires* to be privileged as a matter of the constitutional essentials.¹⁷⁶

Second, from the perspective of SJ, political uses of copyrighted material are particularly important. Such uses of copyrighted material are of great importance to SJ because such uses are instances where both the fair value of the political liberties and the fair value of the cultural liberties must be preserved in order to satisfy SJ. Take the case of Jackson Browne and John McCain. During his presidential campaign, McCain played Browne’s song, “Running on

¹⁷² See ROBERTO UNGER, *THE LEFT ALTERNATIVE* 169 (2d ed. 2009) (advocating “[n]ot the humanization of society but the divinization of humanity”).

¹⁷³ Writing from a non-liberal perspective, Julie Cohen develops a similar point: “We can think of the decentered model of creativity as describing a virtuous circle of a different sort, in which greater allowance for play in access to and use of cultural resources promotes substantive equality and equality multiplies the possibilities for the progress of a vibrant collective culture.” Cohen, *supra* note 2, at 1198.

¹⁷⁴ 464 U.S. 417 (1984).

¹⁷⁵ Cf. William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1784 (1988) (arguing that *Sony* was wrongly decided). However, SJ departs from Fisher’s position, in that SJ would be willing to privilege non-transformative “expressive copying,” provided that such copying could be shown to itself express a particular view of what constitutes the good and could articulate itself in such a way that participants in a cultural space could understand it as engaging with culture in some way. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

¹⁷⁶ Depending on all of the empirical facts, SJ might end up requiring or permitting a finding of a fair use in a case similar to *Sony*, but it would depend on the distributive consequences and the consequences for the other basic liberties of such a finding.

Empty,” during a campaign commercial, after which Browne filed a lawsuit against McCain, claiming, *inter alia*, that he did not want his music to be associated in any way with McCain or the Republican party.¹⁷⁷ In this case, the court denied McCain’s motions to dismiss, and thereafter the McCain settled the suit with Brown. However, if the suit had proceeded to trial, SJ might (depending on how the facts would have developed) have supported a fair use defense brought by McCain. SJ wants to ensure that cultural capital does not simply allow its holders to exercise a monopoly over the political uses of that cultural capital. Thus, in order to satisfy the requirement of the fair value of the cultural liberties, SJ would suggest that courts should strongly default to considering political uses of speech to be transformative.¹⁷⁸

This is related to the third stance that SJ takes with respect to fair use. Guaranteeing the fair value of the cultural liberties requires shaping the basic structure so as to ensure that people who wish to participate in cultural production can effectively engage with the background culture into which they deliver their work.¹⁷⁹ Thus, SJ believes that the fair value of cultural liberties is potentially at risk when a system of copyright makes it impossible for a potential author to effectively engage with cultural works that she wishes to engage in a dialogue. Doctrinally, this suggests that SJ would be particularly likely to treat uses as fair when the owner of a copyright is unwilling to license it to an author who wishes to engage with the work¹⁸⁰ and

¹⁷⁷ *Browne v. McCain*, 612 F. Supp. 2d 1125, 1128-29 (C.D. Cal. 2009).

¹⁷⁸ Even political uses of other political speech should generally be considered transformative for SJ, provided that the political ends to which the re-used speech differs from the political ends to which the speech was originally put.

¹⁷⁹ *See supra* Part I.B.

¹⁸⁰ *See, e.g., Suntrust v. Houghton Mifflin Co.*, 252 F. 3d 1165 (11th Cir. 2001), *opinion at* 268 F.3d 1257; *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); *Browne*, 612 F. Supp. 2d 1125.

would regard a particular broad construction of “potential markets” in the fourth factor of the statutory fair use test as potentially violating the proviso of semiotic justice.¹⁸¹

IV. FOUR CONTRASTS

In this part, I shift outside of the fairly strict Rawlsian framework within which I operated in Parts I and II and compare semiotic justice to other justificatory theories of intellectual property (and particularly copyright).¹⁸² I argue that semiotic justice avoids many of the problems associated with welfare-based arguments, fairness arguments, personhood arguments, and communitarian arguments for copyright. Particularly, I argue that semiotic justice may achieve a degree of common ground that other theoretical approaches to copyright are unable to attain because semiotic justice maintains greater neutrality with respect to different substantive accounts of what constitutes the good of culture. As in Part III, I will designate the Rawlsian theory of justice as fairness as modified by the proviso of semiotic justice as “SJ.”¹⁸³

I will compare SJ to several alternative theories of copyright law that have achieved some level of acceptance among lawyers and liberal political theorists.¹⁸⁴ The four theories that I will address are welfare-based approaches; Lockean, fairness-based approaches; Hegelian, personhood-based approaches; and “social planning” approaches that believe intellectual

¹⁸¹ 17 U.S.C. § 107 (2006).

¹⁸² While in Part III I examined only copyright doctrine in relation to SJ, similar examinations could be carried out with respect to patents, trademarks, and more “exotic” forms of IP protection, including *sui generis* fashion protection, personality rights, and *droits moraux*.

¹⁸³ See *supra* note 139 and accompanying text.

¹⁸⁴ An important project that I have not undertaken here, but which may be necessary to fully evaluate SJ’s attractiveness as a theory of copyright is to compare SJ to non-liberal theories. For instance, I do not engage in this Part with Cohen’s cultural theory. See JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (forthcoming 2012); Cohen, *supra* note 2.

property rights should be used to shape a just and attractive culture.¹⁸⁵ I am focusing on liberal theories in keeping with the use of Rawlsian political theory as an argument within the big tent of liberalism and, beyond that, a fighting faith.¹⁸⁶

If SJ is successful, it will suggest some possible resolutions to conflicts that are embedded in liberal society. Furthermore, as a Rawlsian theory, I hope that SJ can attract an “overlapping consensus” of liberal theories of copyright that will endorse its precepts which are, I will argue in the following sections, “thinner” than those of the other theories of copyright.¹⁸⁷

As a preliminary, I will mention one further classification of these liberal approaches that bears on the arguments for and against each approach. As I will describe them, three of the approaches (welfare, personhood, and culture) are consequentialist with respect to copyright, because their force in recommending a particular copyright regime rests on particular *outcomes* of granting copyright protection to expressive works: outcomes that, respectively, promote social welfare, protect personhood interests of authors or consumers, or promote the most desirable sort of culture. I also take the most persuasive variants of the labor approach to be consequentialist in this respect: recognizing copyright enables authors to recoup earnings from their works. There are some versions of the fairness approach that are *not* consequentialist in this regard, but that instead argue that copyright is a matter of natural law, and by virtue of creating an expressive work, an author has natural rights to use the work, exclude others from its use, and transfer these rights to use and exclude.¹⁸⁸ SJ is non-consequentialist in its requirement of neutrality of aim

¹⁸⁵ These theories are derived from William W. Fisher III’s taxonomy of theories of intellectual property. See William W. Fisher III, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 169–73 (Stephen Munzer ed., 2001).

¹⁸⁶ See RAWLS, *supra* note 3, at 1-2.

¹⁸⁷ See RAWLS, *supra* note 3, at 32-38 (describing the idea of an overlapping consensus).

¹⁸⁸ See Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 842 (1993).

with respect to conceptions of the good, while SJ also has consequentialist elements in that the evaluation of whether a particular system of copyright law conflicts with or respects the requirement that the fair value of the cultural liberties be honored depends on the practical effects of the regime of copyright law on expressive cultural liberties.

A. The Welfare Argument for Copyright

The most dominant theory of copyright in academic literature today argues that copyright should be designed to maximize social welfare.¹⁸⁹ This theory grows out of utilitarian political theory, which argues that political institutions and laws should be designed to maximize net social welfare.¹⁹⁰ Social welfare can be defined in a number of ways. Benthamite utilitarians define social welfare as the aggregation of individual preference satisfaction. While this approach may be the least theoretically problematic method of measuring social welfare, it is impossible to administer, so welfare theorists turn to alternatives, most commonly the wealth maximization criterion which states that government institutions should maximize “aggregate welfare measured by consumers’ ability and willingness to pay for goods, services, and conditions, or the ‘Kaldor-Hicks’ criterion,” which provides that one state of affairs should be preferred to a second if the individuals who gain in welfare in the first state of affairs relative to the second could, by lump-sum payment, compensate those individuals who are worse off and

¹⁸⁹ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 4 (2003) (“Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.”); see also Edwin Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 51 (1989) (commenting that justifications of intellectual property rights “turn[] on considerations of social utility”).

¹⁹⁰ See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 3 (Clarendon Press 1907); JOHN STUART MILL, *UTILITARIANISM* 10 (4th ed. 1871); ARTHUR PIGOU, *THE ECONOMICS OF WELFARE* (1920).

remain better off than they would be in the second state of affairs.¹⁹¹ Selecting one of these criteria rather than another will result in different outcomes when evaluating what legal frameworks to implement.

The premise of this approach is that, absent incentives to authors, expressive works will be produced at less than optimal levels because they are “public goods.”¹⁹² In the absence of copyright, or a similar system of property rights, “the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying.”¹⁹³ This is because expressive works are (largely) (1) non-rivalrous and (2) non-excludable. They are (largely) non-rivalrous because, unlike material resources, one person’s use of the product does not diminish the capacity of others to use the property as well, so the marginal cost of production (of the expression itself) is zero.¹⁹⁴ They are (largely) non-excludable because once the expressive

¹⁹¹ Fisher, *supra* note 185, at 177.

¹⁹² William W. Fisher III, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1, 21 (2007).

¹⁹³ LANDES & POSNER, *supra* note 189, at 40.

¹⁹⁴ BENKLER, *supra* note 80, at 36 (2006); JULIE E. COHEN, LYDIA P. LOREN, RUTH L. OKEDIJI & MAUREEN A. O’ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6 (2d ed. 2006); *see also* Waldron, *supra* note 188, at 870 (describing intellectual property as “non-crowdable”). Intellectual property works may not be *entirely* non-rivalrous because users may derive some utility from goods that are only accessible to a small number of people. *See* Jeffrey Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195, 204-10 (2007) (discussing “snob” and “Veblen” effects of trademarks). This may be a more pronounced phenomenon in the context of trademark than in the context of copyright, but there seem to be at least some copyrighted goods where Harrison’s analysis of signaling effects might apply, such as prints of photographs and artwork by visual artists and certain limited run books, like Tracy Emin’s *Exploration of the Soul*, which was initially released as an edition of 200 and later re-released as an edition of 1000. *See* Elizabeth Manchester, Tate Collection, *Exploration of the Soul* by Tracy Emin (Nov. 2004), <http://www.tate.org.uk/servlet/ViewWork?cgroupid=999999961&workid=80959&searchid=10973&tabview=text>. Others have argued that overuse may result if intellectual property is left in common. *See* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 475 (2003).

works are produced; there is no easy way to prevent other people from making use of them without paying.¹⁹⁵

Because they are a public good, expressive works “may not be produced in the first place because the author and publisher may not be able to recover their costs of creating” them.¹⁹⁶ Therefore, such goods, like lighthouses, roads, and national defense, may be produced at socially suboptimal levels in the absence of government action to ensure a higher level of production.¹⁹⁷ Limited monopoly rights are one possible system of incentives provided by the government to induce a closer-to-socially-optimal level of production of intellectual goods. The public good problems are exacerbated when there is a high level of uncertainty about whether a particular product will succeed on the market, because, in the absence of intellectual property rights, copiers can be expected to step in when a product proves highly successful but not when it is unsuccessful, leading creators to bear all of the downside risk but little of the upside risk of creating intellectual products.

Ultimately, the claim that in the absence of incentives intellectual goods will be under-produced is an empirical one. As Landes and Posner point out, there are a number of factors that would induce private actors to create intellectual goods in the absence of legal protection for intellectual property: copies may be of inferior quality (most importantly for fine art), the cost of copying may be greater than zero, the original publisher may be able to sell a work in the interval

¹⁹⁵ COHEN, LOREN, OKEDIJI & O’ROURKE, *supra* note 194, at 6. Expressive works are not entirely non-excludable because there are a variety of mechanisms other than copyright that authors can (and do) use to limit access to their works, including contractual arrangements prohibiting purchasers from making copies (although the protections provided by these arrangements in the United States are limited by the first sale doctrine, 17 U.S.C. § 109 (2006)) and through the use of digital rights management. *See* LANDES & POSNER, *supra* note 189, at 43-45.

¹⁹⁶ LANDES & POSNER, *supra* note 189, at 40.

¹⁹⁷ Fisher, *supra* note 192, at 21.

before copies appear on the market, the creator may use contracts to provide protection against copying, the creator may use technological protection measures to inhibit copying, the creator of the original may be able to increase the price to incorporate the price of a license to make copies, and the author may derive benefits from producing the intellectual work other than from sales revenue (like prestige or goodwill).¹⁹⁸ It is only if these factors prove insufficient to encourage the creation of intellectual property at a socially optimal level that it is necessary for the government to act to avoid sub-optimal production of intellectual goods.

Supposing that empirical research shows that the government should act, the government has a variety of options: it could produce cultural goods itself, it could pay private actors to produce cultural goods, it could award *post hoc* prizes to creators of such goods, it could assist the producers of such goods to increase the goods' excludability, or it could award limited monopolies to the creators of such goods, providing them with legal tools to exclude non-payers from accessing the goods.¹⁹⁹ Copyright, a variant of the fifth solution, is justified, according to welfarist theories, if it is the most efficient solution.²⁰⁰

In addition to requiring a determination of whether production of expressive goods would be too low in the absence of government intervention and what form of government intervention would be most efficient, the welfare approach requires determining what the optimal level of production of expressive goods is. If a copyright scheme is selected as the optimal form of government intervention, the copyright regime must be shaped "so as to strike an optimal balance between two general considerations: the tendency of exclusive rights to stimulate

¹⁹⁸ LANDES & POSNER, *supra* note 189, at 48.

¹⁹⁹ FISHER, *supra* note 1, at 200-01.

²⁰⁰ This is the solution that Bentham preferred: "A exclusive privilege is of all the rewards the best proportioned, the most natural, and the least burdensome. It produces an infinite effect, and it costs nothing." JEREMY BENTHAM, *A Manual of Political Economy*, in 3 THE WORKS OF JEREMY BENTHAM 32, 71 (John Bowring ed., 1838-1843).

socially beneficial innovative activity, and the hazard that such rights will curtail either second-generation innovative activity or public consumption of the fruits of innovation.”²⁰¹ This is an empirical question, and developing a copyright system that maximizes efficiency requires a great deal of fine-tuning.

SJ differs from welfare approaches in that, under certain circumstances, it will counsel against adopting IP rules that maximize social welfare (even according to a non-distorting Benthamite view of social welfare as the aggregation of individual preference satisfactions). Indeed, it will in some conditions counsel against increasing the overall basket of basic liberties, if doing so would undermine the fair value of the cultural liberties, or the equal political liberties). SJ suggests that copyright rules that maximize social welfare as measured by Benthamite utilitarians would result in some individuals having distorted power to control the public space of culture. Similarly, if social welfare were advanced by an interpretation of fair use that would provide such limited protection for parodies that authors would be unable to effectively express criticism of dominant cultural phenomena,²⁰² SJ would likely disallow the interpretation as a violation of the first principle of justice. For instance, Benthamite utilitarians might conclude that expansive joint authorship rights are undesirable, because they increase transaction costs of purchasing and licensing works. While such transaction costs are of concern to SJ, ensuring that the lexically prior commitment to the fair value of the cultural liberties must come first for SJ.

Similarly, SJ could also require deviations from welfare approaches if a rule that enhanced aggregate social welfare violated the principle of equality of opportunity of cultural participation.

²⁰¹ Fisher, *supra* note 192, at 22.

²⁰² *Cf.* *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

Aside from these scenarios, SJ neither requires nor prohibits attempts to design institutions of intellectual property in such a way as to maximize social welfare. While SJ will constrain the field of available choices in many situations, it leaves significant room for the maximization of welfare within certain bounds, which should make it at least moderately attractive to welfarists with some sympathy for concerns about individual rights or distributive justice.

One major difference between SJ and welfarism is that welfarism is more expansive in its claims about what is required of a system of copyright law. As Ronald Dworkin argues, “[u]tilitarianism must claim . . . truth for itself, and therefore must claim the falsity of any theory that contradicts it. It must occupy, that is, all the logical space that its content requires.”²⁰³ Any welfarist theory must advance a certain, controversial interpretation of the appropriate ends of culture: culture should be designed to secure the maximum satisfaction of social welfare (as measured by some particular method such as wealth maximization or Kaldor-Hicks). This is not a vision of culture that Aristotelians or theorists concerned with providing some priority to individual rights or even Millian utilitarians who believe that some preferences are qualitatively superior to others²⁰⁴ are likely to endorse. SJ is able to avoid this problem of totalization to some extent, because it need not endorse, for example, a culture that our moral intuitions suggest is ugly, since it filters out some arrangements of intellectual property entitlements without requiring an endorsement of a single institutional arrangement as a matter of political justice.²⁰⁵

²⁰³ RONALD DWORKIN, A MATTER OF PRINCIPLE 361 (1985).

²⁰⁴ See, e.g., MILL, *supra* note 190, at 14 (“It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.”).

²⁰⁵ It is theoretically possible that SJ could require the endorsement of an “ugly” culture, but this would be the case only if every possible arrangement of institutions that satisfied SJ was regarded as “ugly.” That SJ need not endorse an “ugly” culture is not to say that SJ *prohibits* all sets of institutional arrangements that allow an ugly culture to develop.

SJ must assert its own truth, but it is able to do so with a more limited scope than utilitarianism, allowing the substantive debate about what a good culture looks like to remain open.²⁰⁶

A potentially much deeper problem with welfare approaches is that “the intellectual culture of a community exerts such a profound influence over the preferences and values of its members that the question, whether and how much they would prefer a different culture to the one they have, becomes at the best deeply mysterious.”²⁰⁷ To the extent that welfare approaches rely on *current* preferences about what culture should look like to shape rules for intellectual property, the welfare approach seems to suggest that we live in the best of all possible worlds.²⁰⁸ Hypothetically, suppose that a particular set of copyright rules will favor a certain type of cultural production.²⁰⁹ Perhaps Congress is considering whether to provide a special fair use rule for low-budget documentary filmmakers that would provide a very clear rule ensuring that they could include images of copyrighted works in their films if such images appeared incidentally. Further suppose that empirical evidence suggests that more people would make and distribute low-budget documentary films if such a rule were put in place (because, say, it would be easier to obtain liability insurance and financial support if backers of documentary filmmakers did not have to worry about liability for copyright infringement).²¹⁰ Suppose also that the degree to

²⁰⁶ See *supra* fig. 1.

²⁰⁷ Ronald Dworkin, *Panel Discussion: Art as a Public Good*, 9 COLUM. J. ART & L. 143, 149 (1985); see also EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 2* (1988); Fisher, *supra* note 175, at 1733 (discussing the importance of “shaping preferences”); *supra* Part I.B.

²⁰⁸ Cf. G.W. LEIBNIZ, *THEODICY: ESSAYS ON THE GOODNESS OF GOD, THE FREEDOM OF MAN, AND THE ORIGIN OF EVIL* § 196 (E.M. Huggard trans., 1951), available at <http://www.gutenberg.org/etext/17147> (discussing why God must have chosen to create the “best of all possible universes”).

²⁰⁹ This hypothetical draws on Fisher, *supra* note 175, at 1734-76.

²¹⁰ See generally KEITH AOKI, JAMES BOYLE & JENNIFER JENKINS, *BOUND BY LAW?* (2006) (discussing incidental uses of copyrighted materials in documentary films and practices of licensing).

which most individuals like to watch documentary films is highly dependent on the frequency with which they are exposed to them (another empirical question that would require testing). In such a situation, it is plausible (even setting aside the possible distortions of Kaldor-Hicks and wealth maximization) that aggregate social welfare, as measured by present preference satisfaction curves, would be greater if the rule were not implemented (since there would be some cost to copyright holders, marginally reducing incentives to create other expressive works that most people would rather consume than documentary films). However, it is also possible that if such a rule for documentary filmmakers were adopted, it is possible that over time, preferences for documentary films would increase (particularly if potential audience members were more likely to know people who make documentary films) and long run satisfaction of preferences would be maximized by adopting the rule.

As William W. Fisher III points out, a lawmaker adhering to the welfare approach would, when confronted with this situation, “have to ascertain and take into account the attitudes of the persons who will be affected by his decision toward alternative ways of refashioning their tastes and the amounts they would pay to have those attitudes respected.”²¹¹ This runs into the additional problem that preferences about how we want our preferences shaped are themselves contingent, being conditioned on the background culture, which casts doubt on whether respecting such preferences is truly recognizing genuine individual preferences.²¹²

²¹¹ Fisher, *supra* note 175, at 1737.

²¹² Fisher, *supra* note 175, at 1738-39. Fisher also argues that the lawmaker’s incorporation of second order preferences about preferences is defective because lawmakers’ decisions generally affect a large number of people, so by deciding in a fashion that respects, in aggregate, individuals’ second order preferences about how their first order preferences should be shaped, the lawmaker will defer to the second order preferences of a certain group, which will “give rise to the liberal nightmare—the imposition on some persons of others’ conception of the good.” *Id.* at 1738. I am unpersuaded by this argument for two reasons. First, as Fisher acknowledges, to the extent that second order preferences incorporate desires about “the sorts of tastes everyone

The proviso of semiotic justice that is incorporated into Rawlsian political justice in SJ is designed to address precisely this problem. The Rawlsian requirement of aim neutrality combined with the guarantee of the fair value of the cultural liberties provides bounds on what can be satisfactory arrangements of copyright rules. SJ sets bounds that ensure that individuals have reasonable opportunities to pursue their own conceptions of the good. Once the two principles of justice including the provisos are satisfied, SJ can agree with Thomas Scanlon that, “there are broad limits within which it is an entirely appropriate function of government to support institutions which are judged by citizens to be valuable.”²¹³ This allows SJ to provide at least some guidance on copyright entitlements while maintaining a commitment to liberal individualism and acknowledging that a substantive discussion of what culture should look like is necessary to resolve copyright disputes.

B. The Fairness Argument for Copyright

else ought (or ought not) to have,” the desires “should not be taken into account when making collective decisions.” *Id.* at 1738 n.339. Just as Dworkin suggests that a utilitarian approach not only can but must, in order to remain coherent, set aside first order preferences of this variety, DWORKIN, *supra* note 203, at 364, it would be plausible for a welfare theorist committed to liberalism to do so in this situation as well. If the second order preferences being aggregated are simply preferences that modify individuals’ own first order preferences, the problem of imposing some persons’ conception of the good on others does not arise, or at least does not do so to any greater extent than when lawmakers make decisions aggregating individuals’ first order preferences. Second, second order preferences need not be preferences about the good. Second order preferences could be, for instance, procedural preferences about how new preferences are developed (for example, a preference that I develop tastes that compliment the tastes of my friends so that we can have the most interesting conversations possible). Such preferences may avoid saying anything about the good, and crediting them in a second order preference aggregation would not necessarily lead to a judicial or legislative imposition of a particular conception of the good on all people. Of course, some second order preferences are based on particular conceptions of the good, but so are some first order preferences. I do not think that there is any aspect of the second order preferences that makes them necessarily more likely to embody thick conceptions of the good than first order preferences.

²¹³ Thomas Scanlon, *Panel Discussion: Art as a Public Good*, 9 COLUM. J. ART & L. 143, 169 (1985). SJ does not necessarily envision the same limits that Scanlon envisions.

A second genre of intellectual property theory suggests that “[t]he purpose of intellectual property laws . . . is not to increase social welfare, but to give people what they are due—in other words, to treat people fairly.”²¹⁴ The substance of such theories, then, hangs on what constitutes fairness.

For a long time, the dominant theory within this genre has been a Lockean theory, based on John Locke’s account of the origin of property in the *Second Treatise of Government*.²¹⁵ The basic structure of the argument is as follows: every person owns herself, and thus also owns her own labor. Whatever someone labors upon anything held in common, that person acquires a natural right of ownership over that property, as well as over the fruits of her labor. Further, it is the state’s responsibility to recognize and protect this right.

This right is subject to certain important qualifications. First, a person has a right to extract property from the common only if in doing so she leaves “enough, and as good” in common for others.²¹⁶ In his influential description of Lockean property rights, Robert Nozick argues that, for the purposes of the sufficiency proviso, a person is made worse off “by no longer being able to use freely (without appropriation) what he previously could.”²¹⁷ Second, because earth was given by God to humans to enjoy, but not to spoil or destroy, someone may only take out of nature as much of a resource as she can use without it spoiling.²¹⁸ A number of theorists

²¹⁴ Fisher, *supra* note 192, at 28.

²¹⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88, § 27 (Peter Laslett, ed., 1988); *see* Fisher, *supra* note 192, at 28.

²¹⁶ Locke, *supra* note 215, at 288, § 27.

²¹⁷ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 176 (1974).

²¹⁸ Locke, *supra* note 215, at 290, § 31. The problem of spoilage is largely removed by the advent of money. *See id.* at 300, § 50.

have argued that Locke's theory applies to intellectual property just as well or better than it does to real property and chattels.²¹⁹

Additional specifications are necessary before the property rights provided by Locke's theory become apparent. First, the reasons that a person gains a natural right of ownership over property taken out of the common through labor are somewhat ambiguous. At various points in the *Second Treatise*, Locke suggests that it is because humans have a right to self-preservation, because humans have a religious obligation to improve the land, because every person has an inalienable right to her own person, including her labor, and because such a system provides incentives to put resources taken from common to the most productive use possible.²²⁰ Different reasons for the recognition of property rights in goods taken out of the common will council different entitlements in intellectual property. Lockean theories of copyright must also decide what counts as intellectual labor and what counts as the commons from which intellectual property may be drawn. Upon resolving these questions, Lockean theories argue that creators of expressive works obtain a property right in such works by virtue of using their labor to create them.

An alternative approach within the fairness genre of intellectual property theories is "equity theory," which holds that "each participant in a collective enterprise deserves a share of its fruits proportionate to the magnitude of his or her contribution to the venture."²²¹ Similarly to Lockean theories, this approach raises definitional issues concerning the "collective enterprises"

²¹⁹ See Hughes, *supra* note 141, at 316 (1988); Seana Valentine Shiffrin, *Intellectual Property*, in 2 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 657 (Robert E. Goodin, Philip Pettit & Thomas Pogge eds., 2d ed. 2007). But see Hettinger, *supra* note 189, at 37 n.19.

²²⁰ Fisher, *supra* note 185, at 184-85.

²²¹ Fisher, *supra* note 192, at 29-30.

in which individuals participate, “contribution” that someone makes to the venture, and what counts as “proportional.”

SJ differs from fairness theories in that it does not recognize any “natural” right in authors. Indeed, it does not necessarily require that authors be provided with any entitlements arising from their work, as long as doing so does not give rise to a cultural apparatus that does fails to provide for the fair equality of opportunity in cultural participation. SJ can (and perhaps must) accept that property and intellectual property are conventional, and must be justified as part of a political theory, rather than with reference to natural rights. At the same time, SJ can incorporate some of the attractive features of the fairness or natural rights approach to copyright, because SJ is committed to a system of copyright that sufficiently remunerates authors so that they can participate in professional and semi-professional cultural expression even if they are not wealthy or otherwise privileged. So long as schemes of authorial rights satisfy the Rawlsian principles of justice and the proviso of semiotic justice, SJ cannot provide any reasons to approve or disapprove of any scheme of authors’ rights.

Even if one accepts all of the basic argument that the Lockean theories advance, this does not appear to resolve what, if any, property right to recognize in the creators of expressive works. First, establishing that creating an expressive work entitles someone to a property right in that work does nothing to define the appropriate scope of the property right. Even if a Blackstonian idea of complete dominion made sense in real property, it is hard to imagine what the equivalent could be in intellectual property.²²² Second, there is the question of what one owns: does one own a right to one’s expression, to the ideas that it embodies, or to something else altogether?

²²² See Shiffirin, *supra* note 219, at 657.

And at what level of abstraction can one be said to own this expression or idea?²²³ Third, determining how to assign property rights to authors whose works draw on the previous works of other authors could be a tremendous difficulty. What if an author's work consists almost entirely of allusions to or quotations from prior works?²²⁴ Fourth, fairness theories seem to cast no light on the appropriate term of copyright protection, unless it suggests a term of indefinite length, but this would further exacerbate the problem of apportioning property interests to past and present authors.²²⁵ Fifth, the scope of the sufficiency proviso is difficult to ascertain. Some commentators see the sufficiency proviso as unthreatened by the recognition of private rights in expressive goods because of the unlimited universe of possible expression.²²⁶ Others, however, see the proviso as significantly constraining because it must disallow the removal of expressive resources from the common that will leave others without "enough, and as good," because, for instance, a word or phrase has attained a certain degree of cultural salience²²⁷ or because certain general ideas or general plots or genres are part of a common cultural heritage.²²⁸ Similar arguments also arise in respect to the equity theory in defining the scope of an author's contribution and how to know whether an author's rewards are proportional to her labor.

²²³ See NOZICK, *supra* note 217, at 175.

²²⁴ See Shiffrin, *supra* note 219, at 658 ("Given the high degree of interweaving mutual influences, some conclude that intellectual products should be regarded as part of our commonly owned intellectual heritage. Just as they are created by borrowing from and reacting to prior materials, so they should be available to others as the raw materials from which to generate new variations and works."). In his story, "The Library of Babel," Jorge Luis Borges describes a library composed of a vast number of books, collectively containing every combination of letters, commas, periods, and spaces possible within a 410-page volume, such that "the Library contained all possible books." JORGE LUIS BORGES, *The Library of Babel*, in LABYRINTHS 51, 54-55 (2d ed. 1964). This image suggests the possibility that language itself is a shared medium from which authors draw quotations, as they may do from particular books, further complicating the issue.

²²⁵ See Fisher, *supra* note 185, at 187-88.

²²⁶ See Hughes, *supra* note 141, at 316.

²²⁷ See Fisher, *supra* note 185, at 188 (citing Wendy Gordon's example of the "Olympics").

²²⁸ See Shiffrin, *supra* note 219, at 657.

It may be possible for Lockean accounts to overcome some of these hurdles, but even theorists sympathetic to this notion of intellectual property have often found it necessary to incorporate additional substantive principles into their theories in order to provide some determinacy.²²⁹ Given the tremendous diversity of rights to which authors have been entitled in different times in different parts of the world, it is unclear how such efforts could, as a matter of natural right, fix the appropriate scope of rights that an author should obtain by laboring on an expressive work.

SJ avoids this problem in part by attaching itself to a theory of justice that is rooted in a particular political theory of the person and the idea of society as a system of fair cooperation. SJ is able to bar instantiations of intellectual property law that prevent individuals from developing either the first or the second moral power. At the same time, SJ purposely allows certain indeterminacy, as it aims to be indeterminate among theories or institutions that satisfy the requirements of the two principles and the provisos of SJ. Some of the indeterminacy about the scope of the rights guaranteed by the two principles may be undesirable, but the worse case scenario is that the scope of permissible approaches expands slightly, and SJ leaves slightly more up for debate between other, more comprehensive theories of copyright.

C. Personhood Theories of Property

The third genre of theories of intellectual property is the personhood approach, which argues that, “intellectual products are manifestations or extension of the identities of their creators.”²³⁰ The central figure for this approach is the individual artist, who “is said to define herself in and through her art” and, consequently, “the law ought to provide her considerable

²²⁹ See, e.g., Hughes, *supra* note 141, at 329 (“My own view is that a labor theory of intellectual property is powerful, but incomplete. I believe we also need the support of a personality theory . . .”).

²³⁰ Fisher, *supra* note 192, at 31.

continuing control over that art.”²³¹ This theory is embodied in Article 6bis of the Berne Convention²³² as well as in the United States’ Visual Artists Rights Act.²³³ This approach grows, in part, out of G.W.F. Hegel’s argument that the ability to exercise control over some amount of personal property is necessary for the development of an individual personality.²³⁴ This argument was developed in the context of property by Margaret Jane Radin, who argues that, “[m]ost people possess certain objects they feel are almost part of themselves” and “[t]hese objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.”²³⁵

Drawing on Hegel and Radin, Justin Hughes has developed this argument in the context of intellectual property, arguing that intellectual property rights should be recognized in objects with which authors personally identify, and that some of these rights (the right to attribution and the right to prevent destruction or mutilation) should be inalienable.²³⁶ In addition to Hughes’s approach, there are many other theories of copyright that draw on this intellectual tradition. As Seana Shiffrin notes, these theories generally have one of three characteristics: (1) they argue that intellectual works represent their creators, and are, in some way, extensions of the creators’ personalities; (2) they argue that individuals need to have control over some property through which they can define themselves, and “intellectual works suit these purposes well”; or (3)

²³¹ Fisher, *supra* note 192, at 31.

²³² Berne Convention for the Protection of Literary and Artistic Works, *adopted* Sept. 9, 1886, S. TREATY DOC. 99-27, 828 U.N.T.S. 221, art. 6bis.

²³³ 17 U.S.C. § 106A (2006).

²³⁴ *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 75-77, §§ 44-45 (Allen W. Wood ed., H.B. Nisbet trans., 1952); *see also* WILFRIED VER ECKE, ETHICAL DIMENSIONS OF THE ECONOMY: MAKING USE OF HEGEL AND THE CONCEPTS OF PUBLIC AND MERIT GOODS 45 (2008) (“In willing abstract right, I therefore will property, which in turn means that I will the externalization of my freedom.”).

²³⁵ MARGARET JANE RADIN, REINTERPRETING PROPERTY 36 (1993).

²³⁶ Hughes, *supra* note 141, at 337-50.

through their expressive works, authors undertake particular communicative projects, which they should have a right to stop others from distorting or altering.²³⁷

Scholars have updated these personality theories in two important ways in light of contemporary developments in copyright. First, they have expanded the scope of the theory, in recognition that “[a]ll persons, not just traditional graphic artists, must be afforded meaningful opportunities to express and define themselves artistically.”²³⁸ In order to avoid unfairly privileging certain individuals (such as visual artists and poets), personhood theories must be stated at a high enough level of generality that they apply to the sorts of expression that many people engage in.

Second, the personhood approach “must be adjusted to take into account the fact that, in modern societies, most people express themselves artistically not through the manipulation of primary, raw materials (paint, canvass, stone, paper, ink), but by manipulating and recombining extant intellectual products.”²³⁹ Thus, the personhood interests not only of one set of authors, but also of second generation authors seeking to make use of existing cultural products (and perhaps even of verbatim copiers²⁴⁰) must be taken into account.

In order to provide guidance on what sort of copyright system, if any, should be in place, personhood accounts must make a decision about what personhood interests ought to be

²³⁷ Shiffrin, *supra* note 219, at 660. Some theories make a claim about the importance of privacy, particularly in the context of unpublished materials, which is sometimes but not always linked back into the importance of intellectual property to creating one’s personality. See Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFF. 247, 251 (1991); see also Waldron, *supra* note 188, at 873-74.

²³⁸ Fisher, *supra* note 192, 32.

²³⁹ Fisher, *supra* note 192, 32; see NETANEL, *supra* note 169, at 196-99 (discussing digital technology and creative appropriation).

²⁴⁰ See Tushnet, *supra* note 175, at 562-81.

promoted, and must also construct an empirical account that connects the adoption of a particular institution or rule to the promotion of the specified interests.

SJ differs from personhood theories in that it does not necessarily recognize any right of authors to control the works that they create. Neither Rawls's first and second principles of justice nor the proviso of semiotic justice require the allocation of any particular set of property entitlements or moral rights to authors. As with respect to Lockean theories of labor and natural property rights, SJ remains neutral with regard to claims about the personhood interests of creators in their works.

SJ may be attractive to someone who wishes to protect particular personhood interests, because the two principles of SJ are likely, as an empirical matter, to provide protection to some (but not all) personhood interests. SJ is designed to enable people to form and develop their own accounts of the good and to partake of culture. This commitment overcomes a deep tension within attempts to use accounts of personhood as a basis for intellectual property law: personhood accounts, to the extent that they are able to provide determinate rules to inform the creation and revision of copyright regimes, rely on controversial propositions about what the appropriate ends of culture are. These accounts tend to see culture as embodying the personalities of authors, as they see works of cultural expression as extension of their creators' personalities. This runs contrary to many contemporary analyses of the function of authors.²⁴¹ It may also be objectionable to those who aspire to a culture of cooperation and collaborative authorship.

²⁴¹ See, e.g., ROLAND BARTHES, *The Death of the Author*, in IMAGE, MUSIC, TEXT 142, 146 (Stephen Heath trans., 1977) (seeing a text not as a "line of words, releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash").

SJ avoids this problem because it is not committed to a substantive vision of culture as the product of the actions of any particular individual or group of people, and it does not argue that producers have any natural entitlement to rights in their products. Rather, it recognizes intellectual property rights only when doing so is permitted by the two principles of justice and the provisos (and requires the recognition of such rights only when it is required by at least one of the two principles or provisos). If a scheme of intellectual property rights is incompatible with the principles of SJ, it is normatively foreclosed.

D. The Culture Argument for Copyright

The fourth approach to intellectual property theory is based on the premise that “there exists such a thing as human nature, which is mysterious and complex but nevertheless stable and discoverable, that people's nature causes them to flourish more under some conditions than others, and that social and political institutions should be organized to facilitate that flourishing.”²⁴² This approach seeks to identify the human functionings necessary for a flourishing life. According to William W. Fisher III, drawing on a wide range of theorists and philosophers, these conditions include “health, autonomy, meaningful work, civic engagement, and privacy.”²⁴³ We should imagine a culture, Fisher argues, that would make these functionings “widely available.”²⁴⁴ Among other things, this would require “cultural diversity, a culture embodying a rich artistic tradition, free empowering education, political democracy, and semiotic democracy.”²⁴⁵ We should then, Fisher argues, modify copyright law in order to advance this substantive conception of a just culture.²⁴⁶

²⁴² Fisher, *supra* note 175, at 1746.

²⁴³ Fisher, *supra* note 192, at 34.

²⁴⁴ Fisher, *supra* note 192, at 34.

²⁴⁵ Fisher, *supra* note 192, at 34.

²⁴⁶ Fisher, *supra* note 192, at 35.

In itself, the only guidance that the “culture” approach offers for copyright is that copyright should be formulated in such a way that fits with the right substantive account of the good. The substantive theory of the good life then provides substantial guidance for copyright, suggesting, for instance, that we should modify copyright “to remove the impediments it sometimes poses to educational activities” and to “increase opportunities for critical or transformative uses of intellectual products,” avoid extending intellectual property protections to “things (such as facts and historical theories) essential to political conversations and deliberation,” replace the copyright system as applied to digital distribution of recorded media with “an alternative compensation system,” and adopt an “‘opt-out,’ rather than an ‘opt-in’ rule with respect to authors and publishers who wish not to participate in comprehensive scanning and indexing ventures like the Google Library Project.”²⁴⁷ This genre of theory requires first arriving at a substantive theory of the good and then determining, empirically, whether particular arrangements of intellectual property institutions (or other schemes for the promotion of cultural expression) promote or undermine that substantive view of what constitutes a good culture.

SJ differs from the culture approach in that it attempts to maintain neutrality with respect to differing conceptions of the good. While it necessarily rules out some conceptions of the good as incompatible with the proviso of semiotic justice or two principles of justice as fairness, SJ aspires to indifference among the remaining expressions of differing conceptions of the good, working to create the legal conditions necessary for as broad a range of such conceptions to be developed as is possible within liberal society.

SJ argues that there is one principal problem with the culture approach: it relies on a substantive account of the good in order to determine what constitutes cultural justice. It

²⁴⁷ Fisher, *supra* note 192, at 35.

disagrees with the “culture” approach itself, which holds that intellectual property rules should conform to a substantive conception of the good life. Pegging copyright rules to a substantive account of the good is problematic for a number of reasons that I have mentioned: It is more controversial, as it requires potential adherents to commit to much more than an account that is based only on political principles. Additionally, it may be less stable than an account based on political liberalism that seeks to incorporate support for a wide number of possible worldviews.²⁴⁸ And the culture approach ends up with the state promoting a particular comprehensive moral conception with which individual citizens might not agree. To be sure, there may be boundaries within which it is appropriate for the state to promote particular goods desired by a large number of people. However, the existence of some such boundaries is important in order to ensure that individuals are taken seriously as individuals.

Ultimately, in spite of this methodological disagreement with the “culture” theory of copyright, SJ is largely in agreement with it as a substantive matter. At the very least, SJ regards most of the substantive perspectives taken by the “culture” theory as fitting within the range of permissible, although not required, interpretations of copyright. In this sense, SJ might be understood as thinning out the commitments of “culture” theory, aiming to create the conditions necessary for a broad range of cultures to flourish. While not all of the articulations of the good that are expressed in cultural space will be “attractive,” many will be, and the most pernicious of cultures will be excluded as incompatible with the semiotic justice proviso or the first or second principle of justice as fairness. While SJ’s account of what cultural space should look like might not be attractive to strongly committed Aristotelians, it adds the attractive feature of a “hot” cultural space, where the contours of what is understood to be a just and attractive culture

²⁴⁸ See RAWLS, *POLITICAL LIBERALISM*, *supra* note 23, at 140.

constantly grow and evolve. Furthermore, it might provide a case for the substantive aims of “culture” theory that are more attractive to pluralist liberals wary of committing to a particular conception of the good. In this ways, SJ might form an overlapping consensus with the “culture” theory.